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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

STAMBAUGH'S AIR SERVICE, INC.,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Board's decision and certification of representative status in Stambaugh's Air Service, Inc., for 4-RC-14673 is unsupported by substantial evidence and/or constitutes an abuse of discretion under the terms and provisions of the National Labor Relations Act, 29 U.S.C. § 151, et seq.

(a) Whether the Board failed to discharge its statutory duties as the "expert" administrative supervisor of representation elections under the National Labor Relations Act when it failed to make adequate arrangements for known foreign language voters to meaningfully exercise their franchise.

(b) Whether Regional agents of the Board failed to adhere to established Board representation election policies when the Board issued unclear and confusing notices of elections and failed to retain the actual ballots case in the representation election process.

(c) Whether this Court should reconsider the policy of according National Labor Relations Board determinations "expert" status given the adjudicative experience with the Board's conduct discharging of its statutory duties in the context of its "representation" election processes.

2. Whether the Board's practice of finding that a statutory violation arises from the employer's utilization of legal process to obtain Court review of the Board's administrative representation case handling constitutes a violation of due process of law in view of this Court's decision in *Bill Johnson's Restaurants* v. *NLRB*, 459 U.S. 1195 (1983).

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NATIONAL LABOR RELATIONS BOARD,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Robert S. Mirin, Esq. on behalf of Stambaugh's Air Service, Inc., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in *Stambaugh's Air Service, Inc.*, No. 83-3439.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-2a) is not reported. The relevant decisions of the National Labor Relations Board are set forth herein. (See App. N, *infra*, 52a-53a and App. Q, *infra*, 69a-79a, which is reported at 266 N.L.R.B. 18).

JURISDICTION

The judgment of the court of appeals (App. A, *infra*, 1a-2a) was entered in June 25, 1984. Thereafter a petition for rehearing was filed with the third circuit. Said petition

for rehearing was denied and the time for filing a petition for a writ of certiorari was extended to and including January 4, 1985. This court's jurisdiction in invoked pursuant to the terms and provisions of 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 7 of he National Labor Relations Act, 29 U.S.C. 157, provides in pertinent part:

> **"Rights of Employees**
>
> "SEC. 7. Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Section 8(a)(1) and (5), 29 U.S.C. 158(a)(1) and (5), provide in pertinent part:

> "SEC. 8 (a) It shall be an unfair labor practice for an employer—
>
> "(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.
>
> "(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

Section 9 of the National Labor Relations Act, 29 U.S.C. 159(a), (c) and (d), provide in pertinent part:

> "SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

"(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board . . .

"(d) Whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filled under section 10(e) or 10(f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony and proceedings set for in such transcript.

5 U.S.C. § 556(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral documentary evidence may be received but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. The agency may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, consider a violation of section 557 (d) of this title sufficient grounds for a decision adverse to a party who has knowingly committed such violation or knowingly caused such violation to occur. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

5 U.S.C. 557(c)(3) provides in pertinent part: . . . The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction relief, or denial thereof . . .

STATEMENT OF THE CASE

On or about April 17, 1981, Stambaugh's Air Service, Inc., (hereinafter the employer), and the International Association of Machinists and Aerospace Workers, AFL-CIO (hereinafter IAM) and the Board's Regional Office entered into a *Stipulation For Certification Upon Consent Election* as a consequence of a representation petition filed by the IAM. From the inception of that matter, including the initial discussions among the parties, which preceded the execution of the *Stipulation For Certification Upon Consent Election;* the employer raised concerns pertaining to anticipated foreign language voter difficulties involving Vietnamese voters, eligible to vote under the terms of the unit description agreed to by the parties, who constituted approximately 32% of the eligible voters.

The focus of the employer's concerns were twofold: A) The language of the notice of election and ballot format to be utilized in the election format. B) The need for a neutral translator in order to assist Vietnamese employee voters who were unfamiliar with the operation of industrial democracy under the terms of the National Labor Relations Act.

The voting methodology, familiar to those Vietnamese voters, required that they signify their preference by *eliminating* or crossing out the choice they wished to remove from a ballot. The voting methodology utilized by

the National Labor Relations Board in its referendum voting procedure treats ballot markings as *designations* of voter choice indicated by the marking of the appropriate box on the ballot. Accordingly, the Vietnamese mode of indicating voter preference was diametrically opposed to the manner in which the Board interprets ballot markings in representation elections.

The ballot marking procedure utilized by Vietnamese voters, when utilized during the balloting process, would result in a misconstruction of the voters' intent. This anticipated problem, along with the general linguistic difficulties presented for eligible Vietnamese voters was called to the Board's attention even prior the execution of the *Stipulation For Certification Upon Consent Election.* At that time the Regional agents for the Board indicated that the Board would make all necessary election arrangements which the Board deemed necessary to discharge the Board's status and obligation as the administrator of representation election processes under the National Labor Relations Act.

Subsequently, the Board prepared two different Notices of Election. Normally, only a single notice would have been prepared. The purpose of the notice is to advise voting employees of the time, place and circumstances of the pending Board conducted representation election and to advise eligible employees of their statutory rights. The first Notice of Election, prepared by the Board in this case, was incomplete. Portions of the notice were not translated into Vietnamese. The Board's Regional Office thereafter prepared a second Notice of Election which did reflect a more complete but confusing translation of the Notice of Election into Vietnamese.[1]

[1] The original format for the Notices of Election—both 1 and 2— have been lodged with this Court in order that the Court may, for itself, make an assessment of the efficacy of the Notices of Election as the Board selected means for dispelling any confusion or the problem involving voting methodology arising from the dichotomy between Vietnamese voting procedures and Board voting procedures.

Assuming that the Notices of Election were sufficiently clear to apprise voters concerning the time, place and circumstances of the election as well as employee rights; it was and remained petitioner's contention throughout the representation case processes that the notices and sample ballot thereon were insufficient, standing alone, to accord Vietnamese voters an adequate understanding of Board voting methodology. Understanding the Notices of Election and understanding the voting procedure to be followed are two separate and distinct problems. Assuming that the language of the sample ballot *"Mark an X in the square of your choice"* was clearly and legibly translated into Vietnamese—a contention never conceded by the employer—such a translation in no way rectifies the voting methodology confusion for Vietnamese voters. The instruction is consistent with both the Board and Vietnamese methodology for marking a referendum ballot.

A Vietnamese voter, in order to mark a ballot in favor of representation, (i.e., to cast a "yes" vote), would mark through the "no" box on the ballot. This vote would be counted under the Board's procedures, as a "no" vote. Similarly, a "no" vote, would be cast, under the Vietnamese methodology, by marking an "x" through the "yes" box. This marking would be counted, by the Board, as a "yes" vote.

The Regional agents of the Board provided Notices of Election printed in English and typed in Vietnamese[2] which were posted several days prior to the election.[3]

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[2] The Notices of Election, as previously noted, have been lodged with this Honorable Court in their format as presented by the Board to the employer for posting. Several observations are germane: a) the documents, as prepared and submitted by the Board, are exceedingly complex. Much of the Vietnamese translation is not interlineated throughout the Notice of Election. Furthermore, on the first Notice of Election there is no Vietnamese translation for the crucial middle panel of the Notice which, *inter alia*, sets for the sample ballot. b) As to the second Notice of Election, wherein the middle panel was translated on an interlineated

(Footnote Continued on next page)

At the pre-election conference, the employer's representative again raised these questions and concerns pertaining to the voting process and voting methodology. Despite these questions and protests, the Board proceeded without a translator and continued, in its role as the expert, to conduct the election in an environment tainted by confusing notices and without the benefit of a translator to assist Vietnamese voters.

The election resulted in the certification of a one-vote plurality in favor of representation (Appendix B, infra, 3a-4a). There were approximately 130 eligible employee voters. Approximately sixty-one (61) "apparent" yes votes were tallied and sixty (60) "apparent" no votes were tallied. Of the eligible employee voters, forty (40) were native Vietnamese who had no prior voting experience under the National Labor Relations Act or in the context of American election procedures.

Stambaugh's Air Service filed timely objections to the election including, *inter alia*, an objection to the Board's failure to supply a translator in order to dispel Vietnamese

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(Footnote 2 and 3 Continued)
basis, an examination of the document discloses that it is yet more complex and confusing. Even if the translation *vel non*, disposed of the voting methodology question; neither Notice would have been adequate to dispel the confusion which existed for first time Vietnamese voters who were totally without cultural or social experience relevant to a voting process similar to that administered by the Board. Apart from the foregoing, as previously noted, the mechanical translation of the Board instruction concerning the marking of the ballot, which appears on the face of the sample ballot, in no way addresses the voting methodology problem.

[3] The timing of this "expedited" election reflects the fact that the Board scheduled an "expedited" election. Thus, the ballots and the time frames involved in the election did not encompass the normal period of time utilized by the Board in order to comply with the eligibility rules articulated by this Court in *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966).

voter confusion pertaining to voting methodology. (App. C, *infra.*, 5a-7a). Initially, the Board's Regional Director found all but two of the objections to be without merit and ordered that a hearing be held pertaining to two objections not in issue in this appeal. (App. D, *infra*, 8a-11a). Thereafter, the employer filed an appeal of that determination to the Board and the Board ultimately ordered, *inter alia*, that a hearing be conducted upon Objection Number 9 as filed by Stambaugh's Air Service's labor consultant.[4]

Objection 9 was lodged with the Regional Director and thereafter with the Board:

> "Objection 9. The employer alleges that its Vietnamese employees were deprived of the opportunity to exercise their freedom of choice in the election because the ballots were not clear as to the method of voting. There are approximately forty (40) Vietnamese employees in the bargaining unit the majority of whom do not speak English. There was no natural Vietnamese interpreter present during the voting session, . . . but the notice of election and the ballots were printed in Vietnamese as well as English. Specifically the employer contends that the method of marking the ballot was unclear to the Vietnamese employees. The employer represents that in Vietnam an individual votes for a candidate of his choice by crossing out the opposing candidate's name and that some of the Vietnamese employees were confused and could have intended to vote against petitioner when they marked the "yes" box." (App. E, *infra*, 12a-14a; see also, App. F, *infra*, 15(a)-17(a)).

Subsequently, the Board ordered, *inter alia*, that its Regional Office agents conduct an expanded hearing which

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[4] It is significant to note that the Regional Director's initial determination disposing of Objection 9 concluded erroneously that the Board had not been ad ised of this problem prior to the time of the election (App. D at 10a). The subsequent Hearing on Objections discloses that that determination of the Regional Director was clearly erroneous. (See App. "L"—at 38a-39a, which established that Regional agents of the Board were advised of the problem prior to the execution of the "stip. cert." upon which the election was conducted.)

included the foreign voter language issues (App. G, *infra*, 18a-19a).

In the context of that Board's Order, the employer learned, for the first time, that the Board had failed to adhere to its own policies concerning the retention of marked ballots in a contested representation election. (See App. H, I, and J, *infra*, 21a-25a). The Board's Case Handling Manual, which purports to set forth representation election procedures, provides that "foreign language, notices printed in foreign language may also be posted. If a foreign language notice is used the language must also be used on the ballot. . . ." (§ 11314 NLRB Case Handling Manual, Vol. 2). Furthermore, the Case Handling Manual requires, in the context of representation proceedings, that ". . . marked ballots: in bundles of 50 should be preserved until the case is finally closed; unmarked ballots should be carried away from the premises or immediately destroyed . . .". (§ 11342 NLRB Case Handling Manual, Vol. 2) When the Board overturned the Regional Director and directed a hearing as to Objection 9, it became known for the first time that the Regional Office had improperly destroyed the marked ballots which were the basis for the Board's tally of votes and the certification of election results upon which the IAM's "representative status" is predicated.

Throughout the ensuing hearing process; the employer pursued and litigated, *inter alia*, the voting methodology issue. (App. K, *infra*, 25a-29a) However, the hearing officer's decision mischaracterized the voting methodology issue: ". . . I have determined that Objection 9 involves primarily the employer's claim that some or all of the official ballots were English only, creating confusion among Vietnamese voters . . .". (See App. L, *infra*, at 33a-35a.) The hearing officer's disposition of Objection 9 failed to differentiate between the procedural and substantive issues pertaining to the treatment of foreign language voters which were present in the case and failed to make a valid finding or

provide any rationale or basis for so limiting or characterizing the voting methodology issue. The hearing officer's report fails, *in toto*, to deal with the procedural voting methodology issue raised by the Vietnamese voting methodology. (App. L, *infra*. 30a-40a) Neither the hearing officer's report not the ensuing Board Order (App. N, *infra*, 52a-53a) dealt with Objection 9 concerning the voting methodology problems or the manner in which the Regional agents for the Board discharged that aspect of their supervisory/expert function as expert administrators of the Federal industrial election process.

The ensuing exceptions were timely filed with the Board and reurged, *inter alia*, Objection 9. Those exceptions reiterated both aspects of that Objection as it pertained to Vietnamese voters: a) That an English only ballot was used in the election; and b) That the voting methodology problem for Vietnamese voters was uncorrected by the Board's Notice of Election and the Board's failure to utilize a translator to assist Vietnamese voters, even though the Board knew of the voting methodology problem virtually from the inception of the representation election processes. (App. M, *infra*, 41a-51a).

From the inception of the administrative election case proceedings involved in the underlying election, the employer had requested that a neutral translator be utilized by the Board when conducting the election in order to avoid disenfranchising Vietnamese voters and to ensure that Vietnamese voters would be able to effectively participate in the election process. The Regional Office of the Board, when exercising its "expertise" elected not to utilize a translator during this election when to do so was a necessary and appropriate step to ensure that Vietnamese voters would be able to meaningfully exercise their industrial franchise.

The destruction of the marked ballots prior to the resolution of a contested election precluded their inclusion in the record transmitted to the Board. Thus, the record

before the Board did not have the complete documentary evidence necessary to the due process resolution of the voting ballot questions. That deficiency is the product of the Regional Office's failure to follow Board procedures. Also, the hearing officer's report, which was adopted without comment by the Board, made a crucial, speculative finding based upon a hypothetical question to a single Vietnamese employee. The hearing officer found that had a bilingual ballot been utilized, the Vietnamese employees would not have been confused (App. N, *infra*, at 52a-53a). That single instance of administrative conjecture by the hearing officer served, *ipse dixit*, as the basis for the finding that a bilingual ballot had been utilized, *and* was sufficient to resolve the voting methodology problem.

An examination of the Notices of Election discloses, to the contrary, that the ballot itself, whether bilingual (i.e., translated into Vietnamese) or in its "English" form, in no way dissipates the procedural confusion arising from the differences between the Vietnamese voting methodology and Board voting methodology.

Since Court review of the Board's decision and certification of representation (App. N, *infra*, 52a-53a) is virtually unavailable on a direct basis; the employer was thereafter constrained to "refuse to bargain" with the IAM based upon its belief that the certification was erroneous. The IAM filed an unfair labor practice charge, complaint was issued (App. O, *infra*, 54a-57a) and the employer sought to have the complaint dismissed (App. P, *infra*, 58a-69a). In that context, the employer re-urged the notices problem, the voting methodology problem and non-compliance with Board practice. The Board denied the employer's motion and on a summary judgment basis found the employer guilty of violating the National Labor Relations Act by virtue of its "refusal" to bargain. By virtue of its efforts to obtain Court review of the representation proceedings, the Board also found the employer guilty of

infringing upon its employees' statutory rights under Section 7 of the National Labor Relations Act (App. Q, *infra*, 69a-79a). This appeal ensued.

REASONS FOR GRANTING THE PETITION FOR A WRIT OF CERTIORARI

This case raises fundamental questions concerning the "due process" requirements of administrative decisional processs. See 5 U.S.C.(3) 556(d); 5 U.S.C 557(c); 29 C.F.R. § 102.69, and the National Relations Board in the context of its representation election authority. See *Armstrong v. Manzo*, 380 U.S. 545, 553 (1965); *Morgan v. The United States*, 298 U.S. 468 (1936): *K.F.C. National Management Corp. v. N.L.R.B.*, 497 F.2d 298 (CA2, 1974); *Prestolite Wire Division v. N.L.R.B.*, 592 F.2d 302 (CA6, 1979); *N.L.R.B. v. Decibel Products, Inc.*, 657 F.2d 727 (CA5, 1981); *N.L.R.B. v. Belcor, Inc.*, 652 F.2d 856 (CA9, 1981); *N.L.R.B. v. Allis Chalmers*, 680 F.2 1166 (CA7, 1982); *N.L.R.B. v. ARA Services, Inc.*, 717 F.2d 57 (CA3, 1983); and *N.L.R.B. v. West Coast Liquidators, Inc.*, 725 F.2d 532 (CA9, 1984).

This is a case where the Board failed to resolve dispositive issues pertaining to the election procedures. Also implicated is Board conduct and findings which are at variance with established Board procedures and the Board decisional law. *Rattan Art Gallery*, 260 N.L.R.B. 255, (1972); *St. Elizabeth's Hospital v. N.L.R.B.*, 715 F.2d 1193 (CA7, 1983); and *Magic Pan, Inc. v. N.L.R.B.*, 627 F.2d 105 (CA7, 1980); and *Alco Iron and Metal Co.*, 269 NLRB No 87 (1984). The Board's subsequent unfair labor practice findings and derivative remedial notice requirements improperly penalizes the employer for seeking court review of the Board's certification of representation. See, *Bill Johnson's Restaurant v. N.L.R.B.*, 459 U.S. 1195 (1983); *Clyde Taylor*, 127 NLRB 103 (1960) and *Los Angeles Bldg. & Constr. Trade's Council* (Noble Elec.), 217 N.L.R.B. 946 (1975).

In the related representation proceeding which antedates and underlies this case the form, but not the substance of due process, was accorded Stambaugh's Air Service. The "voting methodology" issue before the Board in the related representation proceedings was administratively recast and avoided by the Board when it certified a representative based upon a one vote plurality.[5] Neither version of the Board prepared Notices of Election was clear; nor did either version adequately ensure that Vietnamese voters understood how to cast their ballots.

As a consequence of the unilateral and administratively deficient action, recasting the issue before him, the hearing officer addressed an issue concerning Notices of Election content rather than the voting methodology issue which remained as an unanswered objection to the election proceedings. The voting methodology issue, which was fully litigated but unresolved in the election related proceedings below, implicates the Board's exercise of its "expertise" when the Board's regional agents conducted the representation election involving a substantial group of Vietnamese voters. Although clearly advised, from the inception of representation proceedings, that the relevant Vietnamese voting methodology was diametrically opposite to that Board election process; the Board conducted an election where it: a) failed to follow its own election procedures; b) did nothing effective to discharge its obligations as the expert vis a vis those Vietnamese voters; and c) avoided addressing these failures throughout the objections process.

Board precedent makes it clear that voter confusion can impair laboratory conditions and can require the overturning of an election. See *Rattan Art Gallery, supra.* The Board is not stranger to such issues of voter literacy and comprehension. Recently, for example, the Seventh Circuit in *Saint*

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[5] See and compare, *Ona Corporation v. N.L.R.B.*, 729 F.2d 713 (CA11, 1984).

Elizabeth Hospital vs. NLRB, supra, addressed a similar problem. The similarity between the issue in *Saint Elizabeth's* and this case lies in the fact that the Board, in both cases, failed to properly appreciate and react to the importance of a voter "comprehension". In *Saint Elizabeth's, supra,* the Circuit Court deemed this failure significant and dispositive. As the Seventh Circuit noted: "... We do not believe, however, that the ballots alone are sufficient to support the inference that illiterate voters fully comprehend the issues involved and did, in fact, have the opportunity to make an informed choice ..." 114 LRRM at 2314. There the Court had the actual ballots. In this case, even the actual ballots are missing as a result of Board conduct. In *Saint Elizabeth,* the Court remanded the case to the Board on the comprehension issue. Here, the Hearing Officer and Board had a fully developed record on the "voter comprehension" issue. But, by recasting the issue in other terms, the Hearing Officer improperly avoided the issue and the Board failed to correct the Hearing Officer's failure to address the same issue.

The case, *sub judice,* is distinguishable from *Magic Pan, Inc. v. NLRB, supra,* where unlike here, neither the Union nor the Employer gave notice that there would be any employee difficulty understanding or comprehending the notices and/or ballots to be utilized in the election; also the limited indicia of voter confusion in *Magic Pan, Inc.* was deemed insufficient to set aside the election results.

In *Rattan Art Gallery, supra,* the Region was placed on notice of the problem and failed to act. *Rattan Art Gallery* should control the present situation. *Rattan Art Gallery* noted that "... the Board has long held that it is the function and duty of the National Labor Relations Act to establish election proceedings conditions as nearly ideal as possible in order to determine the uninhibited desires of the employees ..." (citation omitted.) *Rattan Art Galleries,* at 109 LRRM at 1150. The failure to resolve the voting methodology issue is clearly an omission of the same order

of magnitude as the one which confronted by the Board by *Rattan Art Gallery*, yet the Board upheld the certification in this case. The right to understand how to cast a ballot is as fundamental as any right to understand the other protections of the National Labor Relations Act.

The Board is no stranger to the problem presented in this case. The adequacy of the Notice of Elections has been raised in other representation cases, in the context of groups of non-English speaking employees (See and compare *Rattan Art Gallery's*, *supra* and *Magic Pan*, *supra*). Established Board practice is to provide notices in other languages when they are appropriately requested by a party to the election. Elections have been set aside on the grounds that the bilingual notices requested by the employer were not provided until shortly prior to the election. See, for example, *Thermalloy Corp.*, 233 NLRB 428, (1977). The established parameters of foreign language notice practice were not satisfied in this case where a substantial number of voters were adversely affected by the Region's management of the election. See and compare, *Wicks Forest Industries*, 227 NLRB 229 (1976), which involved the question of whether a number of Spanish surnamed employees could read or understand English ballots in that case.

The Board has, over the years, created numerous procedures pertaining to the conduct of elections which are designed to ensure that the outcome of the election process reflects a free and fair choice to the voters. "[it] has long been established that the Board is responsible for assuring properly conducted elections . . .". *Kerona Plastics Extrusion Co.*, 196 NLRB 1120 (1972). Historically, the Board has referred to the conditions surrounding the conducts of election as constituting:

> ". . . [A] [L]aboratory [in which] conditions as nearly ideal as possible . . . [are maintained] . . . to determine the uninhibited desires of employees . . . [and] atmosphere conducive to sober and informed exercise of the franchise, free not only from interference, restraint, or

> coercion violative of the act, but also from other elements or impede a reasonable choice." *Sewell Mfg. Co.*, 138 NLRB 66, (1962), *supplemented*, 140 NLRB 220; (1962).

In *McClendon Trucking*, 255 NLRB 1304 (1981), the Board noted that "... [I]t is the Board's responsibility to establish proper procedures for the conduct of elections." An important part of the procedure established by the Board is that all eligible employees should be given a meaningful opportunity to vote. See, *Yerges Van Liners, Inc.*, 162 NLRB 1259 (1967), and *Alterman's—Big Apple, Inc.*, 116 NLRB 1078, (1956) which, while factually distinguishable, support the position that enforcement of the Board's order herein should be denied. In each of these cases, the Region proceeded with defective election procedures which resulted in the election being set aside. The responsibility for establishing proper procedure resides with the Board; that responsibility was not satisfied in this case and so, the underlying election certification should have been set aside.

Also, the Board did not have a complete record before it when disposing of the election related objections. The Regional Office, which conducted the election at variance with established Board policy, failed to retain the ballots actually utilized in the election process. This failure to adhere to established Board policy prejudiced the Employer's ability to litigate the question concerning the actual linguistic content of the ballot utilized in the election process. (Cf) *Morgan vs. the United States*, 298 U.S. 468 (1936); and 5 U.S.C. § 556(d), which sets forth the relevant points of the general standard for administrative decisional processes as follows:

> "... A party is entitled to present his case or defense by oral or *documentary evidence* to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency

> may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form. (*Emphasis supplied.*)

In this case the Board's Regional Office improperly destroyed the evidence which would have definitively established the Employer's contention concerning the linguistic content of the ballot (i.e., an English vs. a Bilingual ballot).

Historically, the Board's discharge of representation case process responsibilities has been an increasingly difficult unsatisfactory area of Board performance for the federal courts. See and compare, *KFC National Management Corp. v. NLRB, supra; Prestolite Wire Division v. N.L.R.B., supra;* and *N.L.R.B. v. Decibel Products, Inc., supra,* and other cases cited *supra* at page 12.

In short, the disposition of the election objections which underlies the unfair labor practice findings in this case improperly fails to furnish a reasoned explanation for the Board's decision pertaining to the voter methodology issue. *Atchison, Topeka and S.F.Ry. Co. v. Witchita Board of Trade,* 412 U.S. 800 (1973). Confronted with the problem of voter pluralism; the hearing officer and the Board, in the context of the ensuing unfair labor practice findings, utilized a liturgical formulae as the device for ignoring its acknowledged responsibility to dispose of the questions surrounding voting methodology. The Board failed to confront this question which lies at the heart of the election process and which necessarily undermines the one vote plurality upon which the Board's certification of the IAM is predicated. In short, the Board's decision below and in the related representation proceeding, pertaining to the voting methodology question, is not only erroneous as a matter of law; it is also unsupported by substantial evidence in the record as a whole. See *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474 (1951).

Recent litigation experience with the Board's administration and implementation of its representation election functions suggests that the Court's need to re-examine

their deference to the Board as a source of expertise against society's increasingly complex tapestry of employment law and regulation. At the time that the Board's expertise was acknowledged, there was virtually no other such expertise apart from the embryonic Department of Labor. Such expertise was far simple to attain. As to contemporary complexities see, for example, *Stotts v. Memphis Fire Dept.*, ___ U.S. ___, 81 L.Ed.2d 483 (1984) and *Gunther v. County of Washington*, 452 U.S. 161 (1981).

In its own immediate area of representation election expertise, the Board has experienced repeated changes of position substantively[6] and procedurally.[7]

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[6] See, for example, *Midland National Life Ins. Co.*, 263 NLRB 127 (1982), overturning *General Knit of California, Inc.*, 239 NLRB 619 (1978), which had overturned the standard set forth in *Shopping Kart Food Market Co., Inc.*, 228 NLRB 311 (1977) which had, in its season, overturned *Hollywood Ceramics Co., Inc.*, 140 NLRB 221 (1962). On the Board's experience with hospital unit determinations, see cases such as *St. Francis Hospital*, 270 N.L.R.B. No. 160, 116 LRRM 1465 (1984). Similarly, as to employer neutrality, see *RCA Del Caribe, Inc.* 262 NLRB 76 (1982) and *Bruckner Nursing Home*, 262 NLRB 955 (1982), modifying *Midwest Piping Co., Inc.*, 63 NLRB 1060 (1962); as to "No-Solicitation rules", *Our Way, Inc.*, 268 NLRB No. 61 (1983), overruling *T.R.W., Inc.*, 257 NLRB 442 (1981), which in turn reversed *Essex International*, 211 NLRB 749 (1974); and as to "non-majority" bargaining orders, see *Gourmet Foods*, 270 NLRB No. 113, 116 LRRM 1105 (1984) and compare *NLRB v. Gissell Packing Co.*, 395 U.S. 575 (1969); as to interpretation of election ballots, *Hydro-Conduit Corp.*, 260 NLRB 1352 (1982) overruling *Columbus Nursing Home*, 188 NLRB 825 (1971) as well as *Kaufman's Bakery*, 264 NLRB No. 33 (1982) overruling *Joaquin Compress and Warehouse*, 251 NLRB 23 (1980). See also *Bally's Park Place*, 257 NLRB 777 (1981) and compare *The Wackenhut Corp.*, 223 NLRB 83 (1976); as to the objectionable period when conduct may be challenged as improperly affecting the election's outcome; see also *Dresser Industries*, 242 NLRB 74 (1979) and compare *Ideal Electric Mfg. Co.*, 134 NLRB 1275 (1961).

[7] See, *K.F.C. National Management, supra; Prestolite Wire Division, supra; Decible Products, Inc., supra; NLRB v. Belcore, Inc., supra;*

(Footnote Continued on next page)

The Board erroneously argues, by analogy, against inquiring concerning voter intent. Before the Third Circuit, it was asserted that the closest appropriate analogy arose from the case law pertaining to jury verdict impeachment. The Board asserted that under no circumstances is a jury verdict subject to impeachment. Cf. *contra*, Federal Rules of Evidence, No. 606 (B). Based upon this erroneous legal argument and analogy, the Board took the position that a voter may not be heard to impeach his/her vote. The authority cited by the Board has been superceded by established exceptions, including, *inter alia*, the exception that an impeachment is allowed in circumstances involving *"bias"*, *"extraneous misconduct"*, or a *"misrecorded verdict"*.

In the circumstances *sub judice*, there is a bias/racial component to the Board's failure to provide a translator for the inexperienced Vietnamese voters in the unit. The ensuing unresolved confusion concerning voting methodology resulted in improperly cast votes and an improper certification. To argue from the Board's analogy; the parameters of the impeachment rules suggest that voters, where a racial or cultural concern is at issue, may be heard to impeach the process in question as distinct from their actual vote.

The Board's argument mistakes the thrust of the issue presented by the voting methodology problem. Thus, the issue is not which way a voter has voted, but rather that

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(Footnote 7 Continued)
NLRB v. Allis Chalmers, supra; and *NLRB v. West Coast Liquidators, supra.* Although the Board, in this case, ordered that a hearing be held, *inter alia*, as to the "voter methodology" issue and although the mechanics of a hearing took place; the hearing officer's report makes no meaningful disposition of the "voter methodology" question. Thus, it is as if no hearing on the voter methodology issue had been held and the Board failed to comment upon the hearing officer's failure to comply with the Board's Order and the Board's own rules and regulations requiring a hearing on such objections.

the voting methodology utilized by the voter incorrectly recorded the voter's intention because the Board utilized a different voting methodology and failed to take appropriate steps to obviate the problem. Similarly, when a verdict is incorrectly recorded, courts have recognized the propriety of allowing jurors to testify concerning that fact. *Cf. Randall v. Peerless Motor Car Co.*, 212 Mass. 352, 99 N.E. 221 (1912); *Paul v. Pye*, 135 Minn. 13, 159 N.W. 1070 (1916); and *Nevarez v. Missouri & Pac. Ry. Co.* (Texas Civ. App.) 333 S.W. 2d 394 (1960); See also, *Brown v. Johnson*, 24 Utah 2d 388, 472 P.2d 942 (1970), and *Kennedy v. Stocker*, 116 Vt. 98, 70 A.2d, 587 (1950). It has also long been recognized that jurors may impeach their verdict on the grounds of extraneous misconduct. See and compare *Simmons v. Kuhlman*, 488 F. Supp. 59 (1979, SDNY). Similarly, a jury verdict which is the product of bias or prejudice is impeachable. See and compare, *Tobias v. Smith*, 468 F. Supp. 1287, (1979, WDNY). The limits upon the general rule are far more germane to the facts of this case than is the general rule.

The confused status of the ballots used in the election, their destruction and their unavailability in the context of the objections as well as the failure to utilize a translator to explain voting methodology is more akin to extraneous misconduct than is to an attempt to undermine a verdict on the grounds of a mistake as to fact, law or instructions. Where, as here, the voters/jury are/is hopelessly confused, the vote/verdict can be impeached. See, *Collins v. Atlantic Greyhound*, 233 SC 269, 75 SE.2d 868 (1953). For further examples of the parameters to the general rule; see and compare, *Noll v. Lee*, 221 Cal. App.2d 81, 34 Cal. Rprt. 223 (1963); and *Lee v. Baltimore Hotel Co.*, 345 Mo. 458, 136 SW.2d 695 (1939). Nonetheless, the Circuit adopted the Board's inapposite argument that the voters were improperly attempting to indicate that they had mismarked their ballot. This is not the case.

The evidence was that the Vietnamese voters had marked their ballots correctly utilizing the Vietnamese procedure, and that this problem had been brought to the Board's

attention long prior to the election. It resulted in a dubious tally; it affected forty (40) of the ballots in the context of a one vote plurality. It is submitted that the Board's arguments concerning "voter" impeachment are erroneous as a matter of law.

In addition, the remedial Order, issued by the Board, penalizes the employer for seeking federal court review of the Board's erroneous certification of a collective bargaining representative. The Board's Order treats the employer's good faith recourse to the federal courts as an independent violation of employees' Section 7 rights when the Board's Order requires that the employer post a remedial notice which includes the following language:

> "WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act."

The inclusion of this language, in the context of the employer's otherwise violation-free labor relations history, effectively makes good faith recourse to the federal courts a violation of the National Labor Relations Act. See and Compare, *contra*, *Bill Johnson's Restaurant v. NLRB*, 459 U.S. 1195 (1983); *Clyde Taylor*, 127 NLRB 103 (1960) and *Los Angeles Bldg. & Constr. Trade's Council (Noble Elec.)*, 217 NLRB 946 (1975).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT S. MIRIN, ESQUIRE
Attorney for
Stambaugh's Air Service, Inc.

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NO 83-3439

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

STAMBAUGH'S AIR SERVICE, INC.

Respondent

On Application For Enforcement of an Order of the National Labor Relations Board Docket No. 4-CA-13373

Submitted Under Third Circuit Rule 12(6)
June 19, 1984
Before: ALDISERT and HIGGINBOTHAM, *Circuit Judges*
and FULLAM, *District Judge**

JUDGMENT ORDER

After consideration of all contentions raised by petitioner,[1] it is

ADJUDGED, ORDERED and DECREED that the Board's application for enforcement is granted and the Board's order is hereby enforced in full.

Costs are to be taxed in favor of the petitioner.

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*Honorable John P. Fullam, United States District Court for the Eastern District of Pennsylvania, sitting by designation.

---

[1] Respondent's motion to supplement the record is granted.

BY THE COURT,

_____

Circuit Judge

Attest:

_____

Sally Mrvos, Clerk

DATED: June 25, 1984

APPENDIX B

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

Case No. 4-RC-14673 Date Filed 4/17/81
Date Issued May 28, 1981

Type of Election *(Check one)*

- ☒ Stipulation
- ☐ Board Direction
- ☐ Consent Agreement
- ☐ RD Direction

(If applicable check either or both)

- ☐ 8(b) (7)
- ☐ Mail Ballot

Incumbent Union *(Code)*

STAMBAUGH'S AIR SERVICE, INC.
Employer

and

LOCAL LODGE 1776, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO
Petitioner

TALLY OF BALLOTS

The undersigned agent of the Regional Director certifies that the results of the tabulation of ballots cast in the election held in the above case, and concluded on the date indicated above, were as follows:

1. Approximate number of eligible voters 130
2. Void ballots 0
3. Votes cast for Petitioner 61
4. _____
5. _____
6. Votes cast against participating labor organization(s) 60
7. Valid votes counted (sum of 3, 4, 5, and 6) 121

8. Challenged ballots 0
9. Valid votes counted plus challenged ballots (sum of 7 and 8) 121
10. Challenges are (not) sufficient in number to affect the results of the election.
11. A majority of the valid votes counted plus challenged ballots (item 9) has been cast for: Petitioner

For the Regional Director

STEVEN PLON

The undersigned acted as authorized observers in the counting and tabulating of ballots indicated above. We hereby certify that the counting and tabulating were fairly and accurately done, that the secrecy of the ballots was maintained, and that the results were as indicated above. We also acknowledge service of this tally.

For Employer

For

For Petitioner

For

APPENDIX C

Phone 717-944-1253

STAMBAUGH'S
AIR SERVICE, Inc.

Harrisburg
International
Airport
P.O. Box Box 149
Middletown, Pa. 17057

June 1, 1981

Mr. Peter Hirsch, Regional Director
National Labor Relations Board
Region 4
Suite 4400, Wm. J. Green, Jr., Federal Building
600 Arch Street
Philadelphia PA 19106

Subject: Case 4-RC-14673

Sir:

In the stipulation for certification election held between Stambaugh's Air Service, Inc., and Local Lodge 1776, International Association of Machinists and Aerospace Workers, AFL-CIO, on Thursday, May 28, 1981, the Company charges the following "Objections to the Election" and respectfully requests the NLRB Regional Director/Board to "set aside" the election on the ground that the "Union conduct" during the period of the election campaign created an atmosphere of confusion, fear of reprisal, implied threats, implied promises of benefits, violated no-solicitation rules, and in general conducted their campaign in such a manner that the Union interfered with the "Laboratory Condition" necessary for the Company's employees to participate in a free and democratic form of election.

Item	*Description of Objection*	*See Exhibit*
1	Unlawful Solicitation on Premises	1

2	Observer Conduct During Election	2
3	Union Threat	3
4	Late Receipt of Union Letter, "Misrepresentation"	4
5	Unauthorized Campaigning in Group, "Peerless Plywood Rule"	5
6	Polling Place Interference	6
7	Board Agent Conduct	7
8	Union Representative on Premises During Election and Violation of "Milchen [sic] Rule"	8
9	Foreign Language Voters	9
10	Unlawful Solicitations on Premises	10
11	General Shoe Doctrine	11
12	Inciting Statements from Disqualified Personnel, "General Shoe Doctrine"	12
13	Unlawful Solicitation on Premises	13

Respectfully submitted,
STAMBAUGH'S AIR SERVICE, INC.

Joseph G. Ferko, Jr.

Authorized Representative

JGF:ldk
Enclosures: Exhibits 1 thru 13

cc: Mr. Peter Valentionuzzi, Lodge 1776, IAM, NY, NY
cc: Mr. Mike Bishopp, Lodge 1776, IAM, Essington PA
cc: File

EXHIBIT 9
(Employer's Exception to Elections)

STATEMENT

I, Nhut M. Tran, received the information from my fellow Viet Namese employees that the ballot prepared by the NLRB was not clear as to the methods of voting. The Company and the Union did agree at the pre-election conference on May 6, 1981, to have an impartial Viet Namese translator to be present at the election time and to clarify to the Viet Namese employees any matter dealing with the election, ballot, and election procedures. As a result, many of my Viet Namese fellows felt this lack of foresight of NLRB acted in the best interest of the Union.

_____
Nhut M. Tran
Foreman, T34B Aircraft

Sworn before me this
1st day of June 1981.

Lorrilyn D. Kelsey
Notary Public
My Commission expires
02 January 1982.

APPENDIX D

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTH REGION

Case 4-RC-14673

STAMBAUGH'S AIR SERVICE, INC.

Employer

and

LOCAL LODGE 1776, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO

Petitioner

REPORTS AND RECOMMENDATION ON OBJECTIONS TO ELECTION AND NOTICE OF HEARING

Pursuant to a Stipulation for Certification Upon Consent Election approved by the undersigned Regional Director on May 11, 1981, an election by secret ballot was conducted on May 28, 1981, in the unit described in paragraph 12 of the Stipulation.

The Tally of Ballots, copies of which were served on the parties immediately after the election, showed the following results:

Approximate number of eligible voters	130
Void ballots	0
Votes cast for Petitioner	61
Votes cast against participating labor organization	60
Valid votes counted	121
Challenged ballots	0
Valid votes counted plus challenged ballots	121

On June 2, 1981, the Employer timely filed and served Objections to conduct affecting the results of the election. The Objections allege as follows:

1. Unlawful Solicitation of Premises
2. Observer Conduct During Election
3. Union Threat
4. Late Receipt of Union Letter, "Misrepresentation"
5. Unauthorized Campaigning in Group, "Peerless Plywood Rule"
6. Polling Place Interference
7. Board Agent Conduct
8. Union Representative on Premises During Election and Violation of "Milchen [sic] Rule"
9. Foreign Language Voters
10. Unlawful Solicitation on Premises
11. General Shoe Doctrine
12. Inciting Statements from Disqualified Personnel, "General Shoe Doctrine"
13. Unlawful Solicitation on Premises

Pursuant to paragraph 6 of the Stipulation and Section 102.69(c) of the Board's Rules and Regulations, an investigation of the Objections was conducted under my direction and supervision. During the investigation, each party was afforded the opportunity to present witnesses and evidence relevant to the issues involved. The investigation is closed and the undersigned reports as follows:

• • •

Objection 9

The Employer alleges that its Vietnamese employees were deprived of the opportunity to exercise their freedom of choice in the election, because the ballots were not clear as to the method of voting. There are approximately 40 Vietnamese employees in the bargaining unit, the majority

of whom do not speak English. There was no neutral Vietnamese interpreter present during the voting session,[6] but the Notice of Election and the ballots were printed in Vietnamese as well as English. Specifically, the Employer contends that the method of marking the ballot was unclear to the Vietnamese employees. The Employer represents that, in Vietnam, an individual votes for the candidate of his choice by crossing out the opposing candidate's name, and that some Vietnamese employees were confused and could have intended to vote against Petitioner when they marked the "yes" box.

The Board provided Notices of Election printed in English and Vietnamese, which were posted for several days prior to the election. The ballots instructed the employees how to indicate their choice for or against representation by the Petitioner. If the Employer had reason to suspect that the Ballot was confusing to its Vietnamese employees, it could have brought the matter to the Board's attention prior to the election. Accordingly, I find that Objection 9 lacks merit. See *Northwestern Products, Inc.*, 226 NLRB 653.

• • •

RECOMMENDATION

Having found that Employer's Objections 1, 3 through 6, and 8 through 13 lack merit, I recommend that they be dismissed.

NOTICE OF HEARING

IT IS HEREBY ORDERED, pursuant to Section 102.69 of the Board's Rules and Regulations and paragraph 6 of

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[6] One of the Employer's observers was bilingual, but he was instructed not to speak Vietnamese as neither the Board Agent nor the other observers would be able to understand what was being said. Contrary to Employer's contention, there was no agreement by the Board Agent at the joint conference to provide an interpreter for the voting session.

the Stipulation, that a hearing be held before a Hearing Officer for the purpose of taking testimony to resolve the substantial and material factual issues raised by the investigation of Objections 2 and 7, and

IT IS FURTHER ORDERED, that the Hearing Officer designated for the purpose of conducting such hearing shall prepare and cause to be served on the parties a report resolving questions of credibility and containing findings of fact and recommendations to the Board as to the disposition of said issues. Within 10 days from the date of issuance of such report, either party may file with the Board in Washington, D.C., an original and 8 copies of exceptions thereto. Immediately upon the filing of such exceptions, the party filing the same shall serve a copy thereof on the other party, and shall file a copy with the Regional Director. If no exceptions are filed thereto, the Board will adopt the recommendations of the Hearing Officer.

YOU ARE HEREBY NOTIFIED that, pursuant to the above Order, at a date, time and place to be designated, a hearing will be conducted before a duly designated Hearing Officer of the National Labor Relations Board upon the issues raised by the investigation, at which time and place the parties will have the right to appear in person or otherwise and give testimony.

Signed at Philadelphia, Pennsylvania this 10th day of July, 1981.

PETER W. HIRSCH. Regional Director
for the Fourth Region
National Labor Relations Board

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* Under the provisions of Section 102.69 of the Board's Rules and Regulations, exceptions to this report may be filed with the Board in Washington, D.C. Exceptions must be received by the Board in Washington by July 23, 1981. Pursuant to Section 102.69(g), affidavits and other documents which a party has submitted timely to the Regional Director in support of objections, are not a part of the record unless included in the Regional Director's Report or appended to the request for review, or opposition thereto, which a party submits to the Board.

APPENDIX E

BEFORE THE NATIONAL LABOR RELATIONS BOARD,
WASHINGTON, D.C.

Case 4-RC-14673

STAMBAUGH'S AIR SERVICE, INC.

Employer

and

LOCAL LODGE 1776, International Association of Machinists and Aerospace Workers, AFL-CIO

Petitioner

July 17, 1981

EMPLOYER EXCEPTIONS TO REPORT and RECOMMENDATIONS ON OBJECTIONS TO ELECTION AND NOTICE OF HEARING

Pursuant to paragraph 6 of the Stipulation and Section 102.69(c) of the Board's Rules and Regulations, the Employer files the following exceptions to the Regional Board's Report and Recommendations on Objections to Election and Notice of Hearing.

* * *

Objection 9: Object.

The Employer professes that immediately prior to the opening of the polls, Mr. Timothy Connolly, Petitioner's Representative, did violently object to the following mechanics of the election to the Regional Board Agent: 1) The ballot was not completely in Vietnamese; 2) The ballot was cluttered and confusing; 3) The notice of the election was confusing.

The Employer's Representative, Mr. Joseph G. Ferko, Jr., voiced his objection to the Regional Board Agent: 1) All parties agreed at the Pre-Election Conference in Harrisburg on May 6, 1981, that a third party neutral would be provided by the NLRB to (a) conduct instructions to Vietnamese employees in voting procedures and (b) would be positioned at the voting polls to answer any questions posed by the bi-lingual employees concerning the mechanics of voting.

On the day that the Employer served its objections to the election to the Petitioner, Mr. Ferko did bring this "non-compliance with election procedures" to the attention of Petitioner's Grand Lodge Representative, Mr. Peter Valentinuzzi, at the NLRB Region 4 Office in Philadelphia, Pennsylvania. Mr. Valentinuzzi acknowledged to Mr. Ferko that at the Pre-Election Conference all parties did agree to a third party neutral being present at the voting polls. At the Pre-election Conference, the Employer had recommended to the Board Agent and to the Petitioner that a third party neutral, possibly from the offices of the Indo-Chinese Service Center in Harrisburg, be utilized to perform the services of voter instruction to the bi-lingual employees and to assist in matters dealing with the interpretation and clarification of the mechanics of the election. The Petitioner and the Board Agent refused the Employer's recommendation of using one of the Employer's bi-lingual employees to serve in the above capacity on the grounds they felt that his remarks would not be in the best interest of the Petitioner.

The Employer strongly feels that the mechanics of the Regional Board's conducted election, as handled, did create "conditions which were of such a nature that did not assure the effective and informed expression of the Employer's bi-lingual employee's true desire in the election". The Employer introduces Exhibits V through XVI to substantiate its position on this matter.

On the basis of the statements submitted by interested employees and third party neutrals, the Employer requests that because substantial and material issues of fact exist that a record testimony be taken at a Board Hearing and/or the election be set aside and a new election be conducted.

APPENDIX F

BEFORE THE NATIONAL LABOR RELATIONS BOARD,
WASHINGTON, D.C.

Case 4-RC-14673

STAMBAUGH'S AIR SERVICE, INC.

Employer

and

LOCAL LODGE 1776, International Association of Machinists and Aerospace Workers, AFL-CIO

Petitioner

July 17, 1981

EMPLOYER BRIEF

I) INTRODUCTION

The Company was founded in July 1969 when it first began providing services to small aircraft owned by private and commercial operators. It continued to expand its service when in 1973 it was awarded Government Contracts to service military aircraft.

Stambaugh's Air Service, Inc., today, provides Depot Level Maintenance Services to Government military aircraft, aircraft which in case of emergency could be used for this Country's first line of defense.

As business increased, the demand for personnel increased. The Company in the summer of 1980 began hiring bi-lingual employees, notably Vietnamese "boat people". Today, roughly one-third of its work force consists of bi-lingual Vietnamese nationals.

On the wake of the Company's increase in growth, on April 17, 1981, a petition for Certification of Representation was filed by Local Lodge 1776, International Associa-

tion of Machinists and Aerospace Workers, AFL-CIO, in the offices of National Labor Relations Board Region 4 in Philadelphia, Pennsylvania.

The events continued when on May 6, 1981, a Pre-Election Conference was held with all parties represented at the U.S. Post Office Building in Harrisburg, Pennsylvania.

Pursuant to a Stipulation for Certification Upon Consent Election being approved by the Board's Region 4 Director, an election by secret ballot was conducted on May 28, 1981.

The results of the Secret Ballot Election were that the Petitioner received 61 votes and the Employer received 60 votes. Total votes cast was 121 out of 126 eligible votes.

On June 2, 1981, the Employer timely filed and served the Petitioner with Employer's Objections to the Election (see Employer Enclosure III).

On July 10, 1981, the Regional Director issued his Report and Recommendations on Objections to Election and Notice of Hearing.

II) EMPLOYER'S POSITION

The Employer's position in this matter revolves around four main issues.

* * *

Issue 4: This issue focuses on Employer Objection 9 which the Employer deems highly significant since it involves bi-lingual Vietnamese nationals and the Board's mechanism of elections.

Bi-lingual voters present a communication problem to all concerned. The record reveals that the Employer endeavored as early as the Pre-Election Conference to persuade both the Petitioner and the Board Agent that the outcome of the election rested in the hands of the bi-lingual voters. The Employer's recommendations, though not totally heeded,

were indeed modified to such a degree that failure to accept the recommendation of the Employer caused serious misunderstandings at the time of the election by all parties concerned.

The Employer respectfully requests the Board to consider all facets of this bi-lingual situation in the light of the impact the election results had upon these employees. The Board is asked to consider the fact that it was the "boat people's" initial introduction into a new form of governmental voting procedure, having recently fled a country being dominated by a non-democratic dogma of life, and the impression conveyed to these employee's minds when they realized that "the manner in which they voted did not represent their true desire and interest". Was it indeed a free and democratic system of voting, or was it a replica of "more of the same" from the country they had fled?

III) FACTS OF CASE

(See ENCLOSURE I EMPLOYER EXCEPTIONS TO REPORT and RECOMMENDATIONS ON OBJECTIONS TO ELECTION AND NOTICE OF HEARING.)

IV) REMEDY REQUESTED

The Employer respectfully asks the Board to review the enclosed Employer's Exceptions to the Regional Board's Report as submitted, and to:

1) Set aside the election and dismiss the Petitioner's petition, or,

2) hold a hearing on the grounds that the evidence submitted shows the existence of substantial and material issues of fact which can best be resolved on the basis of record testimony taken at a hearing, or,

3) order the Regional Board to conduct another Stipulation for Certification Upon Consent Election.

Respectfully submitted.

APPENDIX G

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTH REGION

Case 4-RC-14673

STAMBAUGH'S AIR SERVICE, INC.

Employer

and

LOCAL LODGE 1776, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO

Petitioner

DECISION AND DIRECTION

Pursuant to authority granted it under Section 3(b) of the National Labor Relations Act, as amended, a three-member panel has considered objections to an election held on May 28, 1981,[1] and the Regional Director's Report recommending disposition of same. The Board has reviewed the record in light of the exceptions and briefs,[2] and hereby adopts the Regional Director's findings and recommendations except that the Board is of the opinion that material and factual issues have been raised with respect to Objections 8 and 9 which can best be resolved by a hearing. Accordingly, we shall direct that a hearing be held on Employer's Objections 2, 6, 7, and 9.

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[1] The election was conducted pursuant to a Stipulation for Certification Upon Consent Election. The tally of ballots was 61 votes for, and 60 against the Petitioner, with no challenged ballots.

[2] In the absence of exceptions we adopt, *pro forma*, the Regional Director's recommendation that Objections 3, 11, and 12 be overruled, and that Objections 2 and 7 be considered at a hearing. In the absence of any material or substantial issues of fact, we deny the Employer's request for a hearing on Objections 1, 4, 5, 8, 10 and 13. National Labor Relations Board Rules and Regulations, Series 8, as amended, Section 102.69(f).

DIRECTION

IT IS HEREBY DIRECTED that a hearing be held before a Hearing Officer for the purpose of taking testimony to resolve the substantial and material issues raised by Employer's Objections 2, 6, 7, and 9.

IT IS FURTHER DIRECTED that the Hearing Officer designated for the purpose of conducting the hearing shall prepare and cause to be served on the parties a report containing resolutions of the credibility of witnesses, findings of fact, and recommendations to the Board as to the disposition of said objections. Within the time prescribed by the Board's Rules and Regulations, Series 8, as amended, any party may file with the Board in Washington, D.C., eight copies of exceptions thereto. Immediately upon the filing of such exceptions, the party filing the same shall serve a copy thereof on each of the other party and shall file a copy with the Regional Director. If no exceptions are filed thereto, the Board will adopt the recommendations of the Hearing Officer.

IT IS FURTHER DIRECTED that the above-entitled proceeding be, and it hereby is remanded to the Regional Director for Region 4 for the purpose of arranging such hearing.

Dated, Washington, D.C., December 11, 1981.

John H. Fanning, Member

Howard Jenkins, Jr., Member

Don A. Zimmerman, Member
National Labor Relations Board

APPENDIX H

SUBPOENA DUCES TECUM

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

To Regional Director, National Labor Relations Board, Region 4, 7th Floor, One Independence Mall, 615 Chestnut Street, Philadelphia PA 19106. Request therefore having been duly made by Stambuagh's Air Service, Inc. whose address is Harrisburg International Airport, Middletown PA.

You are Hereby Required and Directed to Appear Before a Hearing Officer of the National Labor Relations Board, at a hearing to be held at Room 202, Federal Building & Court House 228 Walnut Street, in Harrisburg PA on the 10th day of February, 1982, at 10 o'clock a.m. of that day, to testify in the Matter of Stambaugh's Air Service, Inc., 4-RC-14673.

And you are hereby required to bring with you and produce at said time and place the following books, records, correspondence, and documents:

1. Official Ballots used in the Election conducted on May 28, 1981, Stambaugh's Air Service, Inc. and Local Lodge 1776, International Association of Machinists and Aerospace Workers, AFL-CIO to be used in Employer's preparation of Case, Objection #9.

In testimony whereof, the seal of the National Labor Relations Board is affixed hereto, and the undersigned, a member of said National Labor Relations Board, has hereunto set his hand and authorized the issuance hereof.

Issued at Philadelphia, Pennsylvania this 1st day of February, 1982.

APPENDIX I

NATIONAL LABOR RELATIONS BOARD
REGION 4
Seventh Floor, One Independence Mall
615 Chestnut Street
Philadelphia, PA 19108

February 22, 1982

Joseph G. Ferko, Jr.
1100 Devonshire Road
Lancaster, PA 17601

RE: Stambaugh Air Service, Inc.
Case No. 4-RC-14673

Dear Mr. Ferko:

This is in response to your subpoena requesting production of the "Official Ballots used in the Election conducted on May 28, 1981, Stambaugh's Air Service, Inc. . . .", (B-261166). We no longer have the actual ballots that were cast in the election. We have only the extra unmarked ballots. The marked ballots were last examined in July 1981, in connection with our administrative investigation of the Objections to the election, but they were subsequently destroyed. Accordingly, we can only provide you with the extra ballots from that election, and those documents will be produced by Counsel for the Regional Director at the hearing on Objections on March 15, 1982, in Harrisburg.

Very truly yours,

PETER W. HIRSCH
Regional Director

APPENDIX J

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 4, PHILADELPHIA, PA 19106

Case 4-RC-14673

STAMBAUGH'S AIR SERVICE, INC.

Employer

and

LOCAL LODGE 1776, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO

Petitioner

MOTION TO SET ASIDE THE ELECTION AND DISMISS PETITION 4-RC-14673

Pursuant to the Board's Rules and Regulations, Section 102.65 Motions, Stambaugh's Air Service, Inc., hereinafter called Employer, files a "Motion to Dismiss and Set Aside the Election" conducted on May 28, 1981, and submits the following reasons thereto:

1. The Employer timely field Objections to the Election on June 1, 1981.

2. The Employer timely filed "Exceptions to the Regional Board's Report on Election" on July 17, 1981.

3. Subsequently, the Regional Director ordered that a Hearing be conducted on Employer's Objection #2, Observer Conduct, Objection #6, 24-hour Rule, Objection #7, Board Agent Conduct, and Objection #9, Foreign Language Voters, on February 9 and 10, 1982.

4. On January 29, 1982, the Employer issued Subpoena ad testifacandum A-648150 to the Regional Director requiring the appearance and testimony of Board Agent, Steve

Plon, for Employer co-related Objections #7, Board Agent Conduct, and #9, Foreign Language Voters.

5. On February 2, 1982, the Employer issued Subpoena duces tecum B-261165 to the Regional Director for the production of various records and reports on RC Petition Cases handled by Board Agent Steve Plon and the Regional Office during Agent Plon's period of employment with the Philadelphia Region of the National Labor Relations Board.

6. On February 5, 1982, the Employer issued Subpoena duces tecum B-261166 to the Regional Director for the production of the Official Ballots used in the Election conducted on May 28, 1981, to be used to present the Employer's Case on Objection #7, Baord Agent Conduct, and Objection #9, Foreign Language Voters.

7. Subsequently, the Regional Director "continued" the previously scheduled Hearing on Employer Objections because of "a side issue", and scheduled a Hearing to be held on March 15, 1982.

8. On February 22, 1982, the Regional Director notified the Employer that the Employer's Subpoena duces tecum B-261166 for Official Ballots of the Election would not be honored, citing, "We no longer have the actual ballots that were cast in the Election, we have only the extra unmarked Ballots". The marked Ballots were last examined in July 1981 . . . "they were subsequently destroyed". "See attached Exhibit I, letter dated February 22, 1982, from NLRB Region 4 Director."

9. The Employer alleges that the failure of the Regional Director to provide the "Actual Ballots of the Election" is in direct violation of Section 11300 Elections of the Board's Rules and Regulations for the conduct of the Election and specifically Section 11342 Closing Checklist "Marked Ballots, in bundles of 50, should be preserved until the Case is finally closed, unmarked Ballots should be carried away from the premises or immediately destroyed."

10. The Employer alleges that since the testimony and evidence intended to produce to substantiate the Employer's Objection #7, Board Agent Conduct, and Objection #9, Foreign Language Voters, was destroyed, the Employer cannot satisfactorily proceed to present its case before the Hearing Officer on March 15, 1982, without prejudicing and damaging their position in this matter.

11. Furthermore, the Employer contends that the integrity and efficiency of the Board's "Conduct of the Election" and the "Direct Violations of the Board Agent and Regional Director" to protect and preserve the "Actual Ballots" of the Election and the failure to destroy "Unmarked Ballots of the Election" reflect great discredit upon the Board Agent and the Board itself as a responsible Government Agency and reflecting a lack of trust, confidence, cause for credibility, as to their impartiality in the administration and execution of the duties and responsibilities of all concerned, as outlined in the Act, that merits an immediate review of these actions and cause for "Setting Aside the Election held on May 28, 1981".

Wherefore, this date, February 26, 1982, the Employer requests the Regional Director to honor its Motion to order the Election held on May 28, 1981, to be set aside.

Respectfully submitted,

Stambaugh's Air Service, Inc.

Joseph G. Ferko, Jr., Esquire
Authorized Representative

APPENDIX K

EMPLOYER'S BRIEF TO HEARING OFFICER

• • •

D. OBJECTION #9, Foreign Language Voters

Employer witnesses James Bradford and Douglas Crout, employees of the Company, both testified that they received "only English" Ballots in casting their vote in the Election.

Vietnamese Employees Hung Tan Dang, Ha Dinh Nguyen, Phu Huu Nguyen,and Muon Van Nguyen all testified that they received only English Ballots in casting their vote in the Election.

All of the above witnesses testified that their "Official Ballot", with the exception of witness Doug Crout who didn't recall who gave him a Ballot, received their Official Ballot from Union Observer Gaudlip and/or Getman. Board Agent Plon did not give then an Official Ballot.

Vietnamese witness Hung Tan Dang further testified that when he received his Official Ballot fro one of the Observers that when he looked at the Ballot and it was in "English only". Since the Ballot was not in Vietnamese, he went over to Observer Tan, and Tan said, in English, "English I don't really understand, either". Then Hung went into the Voting Booth and, being confused, voted, not really knowing if he was voting in the correct procedure. He voted in the Vietnamese way.

Witnesses Ha Dinh Nguyen, Phu Huu Nguyen, and Muon Van Nguyen testified that they did not raise any question to anyone concerning the English Ballots because previously all the Vietnamese in the plant had been told that a neutral interpreter would be present to clarify voting procedures and because no interpreter was actually present at the voting area, they were confused.

Union Representative Valentinuzzi testified to the fact that the Employer did indeed raise the question at the Joint Conference held May 6, 1981, of having a neutral interpreter present at the Election and raised objections to both the Union and Board Agent Plon in not desiring a neutral interpreter present at the Election.

Witness Valentinuzzi, by his own testimony, validated statements made by the Employer's Representative, Mr. Ferko, that there should be an interpreter provided by the National Labor Relations Board, and Union Representative Connolly, who was present at the Joint Conference, made statements to the effect that "well, let the Board do it; they're responsible for handling Elections".

Union Representative Connolly further testified, and thus verified the Employer's statement, that the Board Agent Steve Plon said that he could handle the situation of somebody to be the interpreter, or he would do what he thought was necessary, or "that he could handle the problem of getting the interpreter".

In his testimony, Board Agent Steve Plon verified the fact that the Regional Director made the decision by telephone conversation with him at the Joint Conference not to have a translater present at the Election, over the objections of both parties. Agent Plon also testified that there would be a bi-lingual ballot and a bi-lingual notice.

Agent Plon also verified in testimony the Employer's statements that Union and Employer Representatives did engage in a "heated argument" at a Pre-Election Conference over the manner in which the Region had prepared the Election Notices and Sample Ballots. Agent Plon testified that "he was not sure whether or not the argument that he witnessed was about the Official Ballot to be used in the Election or the Sample Ballot that appeared on the Election Notice".

Agent Plon further testified that he remembered at least one Vietnamese employee who appeared confused and was

acting in a strange way staring intently at the Ballot, trying to understand what it said, and then the person went into the Voting Booth and voted.

Expert testimony was received from witnesses Phuong Ngoc Truong (Vietnamese), Director of the Southeast Asian Social Service Center, Harrisburg, Chi Paul Chen (Ethnic Chinese), Caseworker Supervisor, Indo-Chinese Service Center, and Run Nhek (Cambodian), Case Worker, Indo-Chinese Service Center.

Witness Phuong Ngoc Truong testified to the fact that voting procedures and methods of voting for candidates differ from those used in the United States.

Truong testified and demonstrated that in Southeast Asian Countries, if a voter desires to vote for Candidate "A" of his choice, the voter would cross out Candidate "B".

Both parties agreed, by the stipulation presented by Hearing Officer Small, that in Viet Nam, in the Provinces at least, the voter crosses out the candidate that they do not desire.

Expert witnesses Truong, Chen, and Run Nhek all testified to the fact that had they voted in the Election for their first time in this country and they received an English Ballot, as did the Employer's Vietnamese employees, that they, too, would be confused, as were the Vietnamese voters.

All of the employees testified that they did see posted at one time or another two (2) different "Official Election Notices". One was in English, and the other was bi-lingual, i.e. Vietnamese and English.

The Employer subpoenaed the Regional Director to provide the original "Election Ballots" for the Hearing. Counsel for the Regional Director did not produce the original Ballots of the Election and so stated that the "original Ballots were lost". Counsel for the Regional

Director produced two un-marked bi-lingual Ballots stated as the original, which could have been facsimile therof.

All witnesses testified that they recognized the color of the Ballot but that the Ballot they received was in English not bi-lingual as the Ballot produced by Counsel for the Regional Director.

Union Observer Howard Getman testified that since there were two (2) Election Notices, one in English, one in Vietnamese and English, it was conceivable that Board Agent Plon could have brought two (2) different Official Ballots to the Election and the Hearing Officer so noted for the record that it "is conceivable that Mr. Plon brought Ballots that could have been one in English and one bi-lingual".

Based upon the above facts brought out in testimony before the Hearing Officer, the Employer strongly feels that the mechanics of the Regional Board's Conducted Election and the conduct of the Election itself, did create "conditions" which were of such a nature that did not assure the effective and informed expression of the Employer's bi-lingual employees' true desire in the Election.

* * *

APPENDIX L

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTH REGION

Case 4-RC-14673

STAMBAUGH'S AIR SERVICE, INC.

Employer

and

LOCAL LODGE 1776, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO

Petitioner

HEARING OFFICER'S REPORT ON OBJECTIONS

Appearances:

For the Employer:

Joseph G. Ferko, Jr., Management Consultant
Ferko Associates
1100 Devonshire Road

For the Petitioner:

Perer Valentinuzzi, Grand Lodge Represenative
International Association of Machinists and
Aerospace Workers, AFL-CIO
420 Lexington Avenue, Suite 2348
New York, New York 10117

Tim Connolly, Grand Lodge Representative
International Association of Machinists and
Aerospace Workers, AFL-CIO
8 Freer Street
Lynbrook, New York 11583

For the Region:
Barbara C. Joseph, Attorney
Region 4, National Labor Relations Board
615 Chestnut Street
Philadelphia, Pennsylvania 19106

James F. Small, Hearing Officer
National Labor Relations Board
Region Five
9100 Garmatz Federal Building and
Courthouse
101 West Lombard Street
Baltimore, Maryland 21201

Pursuant to a Stipulation for Certification Upon Consent Election[1] approved by Regional Director on May 11, 1981, a secret-ballot election was conducted under the supervision of the Regional Director on May 28, 1981 with the following results:

Approximate number of eligible voters	130
Void ballots	0
Votes cast for Petitioner	61
Votes cast against participating labor organization	60
Valid votes counted	121
Challenged ballots	0
Valid votes counted plus challenged ballots	121

[1] The unit is:
Included: All full-time employees classified as laborers, janitors, leadmen, quality control inspectors, material control, flight line, engine shop, hydraulic shop, electric shop, egress shop, general plant, sheet metal, ground power and maintenance employees who were employed by Stambaugh's Air Service, inc. at its Middletown, Pa. facility during the payroll period ending May 3, 1981.

Excluded: All office clericals, part time employees, pilots, co-pilots, watchmen, guards and supervisors as defined in the Act.

Thereafter, on June 2, 1981, the Employer filed timely objections to conduct affecting the election.

The Regional Director caused an investigation of the objections to be made and on July 10, 1981, served upon the parties his Report and Recommendation on Objections to Election and Notice of Hearing Finding that the investigation raised substantial and material issues regarding Employer's Objections 2 and 7, and that a hearing should be held on those Objections. The Regional Director recommended that Objections 1, 2, 4, 5, 6, 8, 9, 10, 11, 12 and 13 be overruled.

On July 17, 1981, the Employer filed exceptions to the Regional Director's report. The Board reviewed the record in light of the exceptions and briefs and adopted the recommendations contained in the Regional Director's report, except the Board was of the opinion that material and factual issues had been raised with respect to Objection 6 and 9 which could best be resolved by hearing. In its Decision and Direction issued December 11, 1981, the Boad directed that a hearing be held on Employer's Objections 2, 6, 7 and 9[2]

Pursuant to a Notice of Hearing issued on January 8, 1982, and Order Rescheduling Hearing issued on February 18, 1982, a hearing was held on March 15 and 16, 1982, in Harrisburg, Pennsylvania, before te undersigned Hearing Officer. All parties were afforded a full opportunity to be heard, to examine and cross-examine witnesses, to argue orally,a nd to introduce relevant evidence with respect to

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[2] At the hearing a dispute arose as to what constitutes Employer's Objection 6. The disputed Objection will be discussed later in this report.

the Objections.[3] On the basis of my observations of the witneses while testifying under oath, their demeanor and manner, and on the basis of the entire record including exhibits, I make the following findings of fact, resolution of credibility and recommendations:

THE OBJECTIONS

* * *

> I view the integrity of the election process as a sacred trust of the Board. The slightest hint of taint to the objectivity of the election process warrants review. . . . The question of objectivity of of the Board agent involved herein demands definitive resolution.[3]

* * *

Objection 9

The objection, as filed, reads: "Foreign Language Voters."

The Employer alleges that its Vietnamese employees were deprived of the opportunity to exercise their freedom of choice in the election, because the ballots were not clear as to the method of voting. There are approximately 40 Vietnamese employees in the bargaining unit, the majority of whom do not speak English. The Employer contends that the method of marking the ballots was unclear to the Vietnamese employees. The Employer provided expert witnesses who testified that in Vietnam an individual votes for the candidate of his choice in one of two manners: 1. crossing out the opposing candidate's name on the ballot, or 2. selecting a separate and distinct ballot listing only one candidate or party and deposting that ballot in the ballot box. The former procedure describes voting in rural areas

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[3] The parties were permitted to file post-hearing briefs, in lieu of oral argument on the record. These briefs were to be received by March 26, 1982. Only the Employer filed a brief. That brief is hereby made a part of the official record.

[3] This observation was made "passim" by the Hearing Officer in his report while resolving Objection No. 7 pertaining to Board Agent Conduct.

of Vietnam and the latter procedure describes the voting process in urban areas. The parties stipulated that in the provinces of Vietnam the voting procedure involves the crossing out the candidate not desired.[13]

One of the Employer's expert witnesses, Phuong Ngoc Truong, testified that in his experience in Vietnam elections occurred *only* for candidates and, culturally speaking, the Vietnamese lacked experience in voting on referendums or specific issues. I would agree that, due to cultural differences, Vietnamse employees probably lacked voting experience upon which to analogize voting in a National Labor Relations Board representation election, which I believe is similar to a referendum or voting on specific issues. This position is totally supported by expert witness Truong. However, the same expert witness testified Vietnamese employees would be confused by an English-only ballot. Although an English-only ballot would possibly confuse Vietnamese employees, a ballot in Vietnamese or bilingual English-Vietnamese ballot would eliminate any confusion as the instructions for voting appear on the ballot. Employer witness Dang testified that had his election ballot" . . . had Vietnamese I would have understood, but it didn't so I didn't understand it." On this point, I agree with and credit witness Dang.[14] Thus, an issue herein is not whether Vietnamese employees were confused but

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[13] The discussion of voting procedures in Vietnam refers to conditions existing there prior to the Communist takeover and the exodus of the "boat people".

[14] I have discredited this witness on other points. In crediting here, I rely on the established maxim that "[N]othing is more common in all kinds of judicial decisions than to believe some and not all . . . It is no reason for refusing to accept everything that a witness says, because you do not believe all of it." *NLRB* v. *Universal Camera Corporation*, 179 F.2d 749, 745 (1950); see also *Edward Transportation Company*, 187 NLRB 3, enf'd *per curian*, 437 F.2d 502 (C.A.5). Failure to cite this footnote in other cases where only part of a witness's testimony is credited is not to be deemed a failure to have considered the maxim.

rather whether they received English-only ballots.[15] The Employer in its brief claimed the official ballot was English-only and ". . . that this failure alone by the Board to provide Bi-Lingual Ballots constitutes interference with the Election requiring the election to be set aside." Absent evidence to the contrary, I have determined that Objection 9 involves primarily the Employer's claim that some or all of the official ballots were English-only creating confusion among Vietnamese voters.[16]

I am first left to decide whether any voters received English-only ballots, and specifically if any Vietnamese employees received English-only ballots.[17] Counsel for the Region and the Petitioner claim only a bilingual English-Vietnamese ballot was utilized in the election, such as exemplified by Counsel for the Region Exhibit 3. The

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[15] Record testimony indicated the Region initially provided Notices of Election printed in English and Vietnamese which were posted for several days prior to the election. The first Notices of Election provided (see Employer Exhibit 1) reflected a sample ballot only in English. The subsequent Notices of Election provided (see EMployer Exhibit 2), also posted for several days prior to the election, reflected Notice language in English and Vietnamese and a bilingual English-Vietnamese sample ballot. The Employer did not contend and no evidence was presented that the language of the Notices of Election and sample ballot was confusing or not in compliance with Board procedures. See discussion of possible confusion or inappropriate foreign language notice in *Rattan Art Gallery*, 260 NLRB No. 18.

[16] The issue of English-only ballots was first articulated at the hearing. I specifically note that no adverse inference was drawn, *per se*, against the Employer in this regard. It was conceivable to me that the alleged "confusion" over the ballot arose as a result of the ballot being written only in English. Further, the English-only aspect of the ballot was the only "confusion" alleged by Vietnamese voters. See footnote 15 *infra*.

[17] I have determined that the Employer was not prejudiced on this objection by the Regional Director's inability to produce the ballots cast in the election. Record testimony, due to the unavailable ballots, is sufficient to decide if any English-only ballots were voted.

Employer contends several voters received English-only ballots, and presented witnesses who testified accordingly. The Petitioner and Counsel for the Region presented witnesses who testified all the ballots were bilingual.[18]

Employer witnesses James Bradford and Douglas Crout testified that the ballots they received during the election was English-only. Witness Bradford admitted he was inside the voting booth "no more than five seconds" while Crout admitted being inside the voting booth for "a matter of a couple of seconds". Crout further testified that a person he doesn't recall, stood in the six to ten feet distance between the observer table and election booth and handed him a ballot as he walked toward the booth. Crout failed, upon questioning, to be able to recall the language on the ballot. He remembered folding his ballot while inside the booth. Witness Bradford testified one of the observers gave him a ballot.[19] I credit Board agent Plon's statement that he alone had possession of the ballots during the election before he provided a ballot to a voter approaching the election booth, and the voter thereafter immediately entered the booth to vote. Logically, then it follows that Bradford and Crout had a ballot in their possession for only the briefest of moments, months ago. I find it interesting that no party contends a single English-only ballot was observed during the tallying of ballots.[20]

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[18] I noted on the record that "... it is conceivable that Mr. Plon [Board agent] brought ballots that could have been one [set] in English and one bilingual [set]." Judicial notice is taken of that possibility and I have considered it.

[19] See footnote 11. Only the Board agent provided ballots to voters.

[20] During the tallying of ballots the four observers were across the voting table, literally a couple feet from Board agent Plon. Record testimony unrefuted by the Employer, established that Plon opened the ballots, showed them to all present, and stacked them in their respective "yes" or "no" pile, immediately in front of the observers. Board agent Plon recountd the ballots at the request of an Employer observer. No mention was made at the tally of any ballots being English-only. I find it implausible thqat an English-only ballot would have gone unnoticed at the tally among the distinctive bilingual ballots due in part to the proximity of the observers and counted ballots.

Vietnamese employees Hung Tan Dang, Ha Dinh Nguyen, Phu Huu Nguyen and Muon Van Nguyen all testified on behalf of the Employer that they received English-only ballots on the day of the election. All four of these employees failed to mention the English-only aspect of the ballots they received in their statements attached to the Employer's exceptions. See Board Exhibit 1(h). Three of the four incorrectly testified they received their ballots from someone at the observer's table.[21] I view this serious failure of recollection to be sufficient to question the veracity of these witnesses on this issue, although not grounds to discredit them *per se*. I also found it interesting that two of the four witnesses specifically Phu Huu Nguyen and Ha Dinh Nguyen, estified they were inside the voting booth including time to fold the ballot, less than five seconds.[22]

Both Petitioner observers testified credibly that all ballots were bilingual English-Vietnamese. Board agent Plon also testified, unrebuted by cross-examination, that all the ballots utilized at the election were bilingual English-Vietnamese. I credit these witnesses,[23] and find all ballots

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[21] Only Phu Huu Nguyen did not claim one of the observers gave him a ballot. He could not recall who gave him the ballot.

[22] This brief time hardly impresses me as an indicator of "confusion' caused by an English-only ballot.

[23] In resolving conflicts in testimony, I have taken into consideration the apparent interest of each witness. In addition, I have considered the inherent probabilities, the probabilities in light of other events; corroboration or lack thereof; consistencies or inconsistencies within the testimony of each witness and between the testimony of each of that or other witnesses with similar apparent interest. In evaluating the testimony of witnesses I have relied specifically upon demeanor and has made findings accordingly. While apart from considerations of demeanor I have taken into account the above-noted credibility considerations and my failure to detail each of these is not to be deemed failure to have fully considered it. *Bishop and Malco, Inc.*, 159 NLRB 1161.

were bilingual English-Vietnamese. I discredit the Employer's witnesses regarding their testimony concerning the existence of an English-only ballot. The quality of their testimony as a whole is insufficient to rebut the more likely conclusion that the official ballot was bilingual English-Vietnamese.

The Employer contended at Hearing and in its brief that the parties, and the Board agent, had agreed to the presence of a neutral third-party interpreter during the election.[24] The parties stipulated that no written agreement was reached concerning the interpretor. [sic] Although the Employer contended on brief that Petitioner representatives Peter Valentinuzzi testified at Hearing that the parties had agreed to an interpretor [sic] at the election, such a claim is a misrepresentation of Valentinuzzi's testimony. Valentinuzzi was asked if there was an agreement by the Region to provide a translator during the course of the election. Valentinuzzi responded by saying "no indeed-y". The Employer failed on cross-examination to alter Mr. Valentinuzzi's response in this regard. The Employer called Petitioner representative Tim Connolly to testify concerning the alleged agreement on a translator being provided and present during the election. The Employer also misrepresented Conolly's testimony on brief. According to the official transcript, Connolly testified that there was no agreement on a translator or interpretor being present during the voting. Connolly also testified the Board agent agreed only to arrange a translator to translate the official Notice of Election and official ballot. The Employer called no other witnesses concerning the alleged agreement on a translator. Board agent Plon was questioned by Counsel for the Region concerning the alleged

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[24] I interpreted this claim to be relevant to "confusion" among Vietnamese voters as is the discussion that follows concerning speaking only in English.

agreement on a translator. Plon denied an agreement was reached concerning the Region providing a translator during the voting. The Employer failed to cross-examine the Board agent. Without contradictory evidence, I credit Valentinuzzi, Connolly and Plon on this issue and find no agreement was reached by the parties and Region concerning the presence of a translator or interpretor during the election.

Hearing testimony revealed that Board agent Plon instructed all the observers, prior to the election, to speak only English during the voting as Plon did not speak Vietnamese. One voter, Hung Tan Dang, attempted to speak to employer observer Tan Phat Le in Vietnamese. According to Tan Phat Le, Hung Tan Dang asked "how am I going to vote". Tan Phat Le was advised by the Board agent to answer in English, and thereafter Tan Phat Le advised Hung Tan Dang, "Hung, you go ahead and vote". According to Hung Tan Dang, he didn't know what to do with his ballot after it was cast and he attempted to find out from Tan Phat Le. Tan Phat Le responded in English and Hung Tan Dang didn't understand the answer. Later Hung Tan Dang in response to my questions changed his story and stated he received his ballot[25] at the observer table and attempted to ask Tan Phat Le a question. According to Hung Tan Dang's revised testimony, Tan Phat Le responded by saying he didn't understand either. Suffice it to say, there exist contradictions in testimony of the two Employer witnesses on this matter. I conclude the prohibition on speaking in Vietnamese was a reasonable action by the Board agent. Further, Hung Tan Dang admitted in his testimony that he would have understood the question on the ballot, if the ballot was in Vietnamese. Thus, if the official ballot was bilingual English-Vietnamese,

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[25] I have previously determined that the Board agent gave employees a ballot as they approached the voting booth. No ballots were distributed from the observer table.

the only legitimate reason for Hung Tan Dang to speak with Tan Phat Le would have been to inquire where to deposit the already marked ballot. I credit that portion of Hung Tan Dang's testimony for the reasons described herein this report and its footnotes, and find no voter was disenfranchised by the requirement that the observers speak only English during the election.

Accordingly, I find no reason under this objection that warrants the conduct of a second election. I recommend that Objection 9 be overruled in its entirety.

• • •

SUMMARY OF CONCLUSION

I recommend Objections 2, 6, 7 and 9 be overruled in their entirety. I pray the Board sustains my rulings restricting testimoney and denying an indefinite postponement of the Hearing. I recommend the issuance of a Certification of Representative.

FILING OF EXCEPTIONS

Within ten (10) days from the date set forth below, either party may file with the Board in Washington, D.C., an original and seven (7) copies of exceptions to this Report. Immediately upon the filing of such exceptions, the party filing the exceptions shall serve a copy thereof on the other party and shall file a copy with the Regional Director of Region 4. If no exceptions are filed to this Report, the Board will adopt my recommendation.

Dated at Baltimore, Maryland this 9th day of April, 1982.

JAMES F. SMALL,
Hearing Officer
National Labor Relations Board, Region 5
9100 Garmatz Federal Building & Courthouse
101 West Lombard Street, Ninth Floor
Baltimore, Maryland 21201

APPENDIX M

EMPLOYER'S EXCEPTIONS TO HEARING OFFICER'S REPORT ON OBJECTIONS

D. OBJECTION 9—FOREIGN LANGUAGE VOTERS

The Employer objects to the decision rendered by the Hearing Officer.

The Hearing Officer made the determination "that Objection 9 involves primarily the Employer's claim that some or all of the Official Ballots were English-only, creating confusion among the Vietnamese voters."

In this determination, the Employer feels that the Hearing Officer erred and failed to consider all of the evidence and proof as presented.

The Employer's position on Objection 9 is and has always been that the "mechanics of the Regional Board's conducted Election and the conduct of the Election itself *did not* provide for the needs of "Foreign Language Voters," who are unable to read English.

Hearing Officer Small discredited the testimony as presented by Observer Tan Le, and upon examination of the Official Record of Hearing, the Employer finds no basis for Small's action.

Nowhere in the Record does Tan Le, at any time, make contradictory statements.

Tan answers Small's questions quite clearly that several Vietnamese employees, including employee Ha Nguyen, made the statement to him, after the Election, that "the Ballots for sample and the Ballots we using for the voting it looks different." He later testified to this as fact.

Though he was examined and cross-examined by all parties present, Tan Le not once in his testimony did he make conflicting statements of fact in identifying the Election Notices, the exhibited sample bi-lingual Ballot,

and the fact that the other Vietnamese people did make comments to him about not having someone at the Employer's facility to explain to them "how to vote."

Tan testified that "like because I can speak and read and write English, I can understand"; meaning that Tan understood the English Ballot he received. He stated this again when Hearing Officer Small asked him "did you vote on an English Ballot or on a Vietnamese Ballot?" Tan replied "I vote by the English."

When shown sample bi-lingual Ballots by Small, Tan replied "I think the other ones have the English on the top and I think they are different."

No form of "oral persuasion" by any examiner could convince Tan to change or contradict his previously-made statements. For this reason, the Employer credits witness Tan's creditability and requests the Board to over-rule Hearing Officer Small's discrediting of the witness.

Hearing Officer Small misrepresented the facts as presented in this Objection 9 when he discredits witness Hung Dang's testimony and Officer Small himself becomes confused in his inability to separate instances of fact for Objection 9 with those of Objection 2 (Observer Conduct) as presented by witness Hung Dang.

Hearing Officer Small stated that "Hung Tan Dang didn't understand what to do with his Ballot *after it was cast* and he attempted to find out from Tan Phat Le."

Small misrepresents the facts as testified. It wasn't after he cast his Ballot that Hung was confused. *It was before.* This fact was verified in testimony by Agent Plon and Observer Tan Phat Le.

Hung, when shown Regional Director's Exhibit 3, Sample Ballot, stated, "It's very much like the Ballot, but ours *did not have* the Vietnamese in it. It had only English."

In reply to Hearing Officer Small's question "if he got the Ballot at the Observer Table," Hung replied "yes".

Again, upon questioning by Small, if Hung marked the Ballot, Hung said "Yes, I did. I did it according to Vietnamese way."

Employer finds no contradiction in his review of the Proceedings in any part of testimony as presented by Hung Dang. Hung remains steadfast, positive and straight-forward to all questions asked of him during his testimony. Hung emphasized several times on the record that he received an English Ballot from one of the Observers at the Observer Table. When he looked at the Ballot, he saw it was in "English words". He approached Observer Tan to get clarification on this matter. Observer Tan rejected Hung's pleas for clarification because of Agent Plon's earlier instruction to him to refrain from engaging in conversation with voters in Vietnamese.

Employee Hung has a sixth-grade education and does not speak or understand English except for minor words or phrases.

Agent Plon, in his testimony, as questioned by Council for the regional Director, stated as follows:

Council—Question—"Did you notice any employee acting in a strange way?"

Plon—Answer—"There was one Vietnamese employee who seemed to be staring intently at the Ballot. He was . . . someone was in the Voting Booth and I had handed him a Ballot. It was his turn to go in next . . . he was staring at it, he appeared to be trying to understand what it said. However, he did not ask questions."

The Employer charges that at this instance, Agent Plon failed to act. Agent Plon knew in his mind there was a question, but failed to act and perform his duties.

Witness Lichlyter corroborates Plon's statement about the confused employee, Hung, who was in front of him in front of the Observer Table.

Hearing Officer Small asked the question of Lichlyter "Describe how he appeared confused." Lichlyter testified "Well, he would turn and face the Observer Table basically looking at Tan, who is a member of his own race. He would turn and look at the Ballot Box and he just kept oscillating basically back and forth, not knowing which way to go or what to do."

As the Election was 61 votes for the Petitioner and 60 votes for the Employer, this one incident could have made the difference in the outcome of the Election; and did.

Hung then, when questioned by Union Representative Valentinuzzi on how he voted, testified that he went inside and voted the "Vietnamese way".

Hung, by his own statement, admitted that he voted the "Vietnamese way", i.e., if I desire Candidate A to be elected, I cross out Candidate B.

Expert witnesses Phuong Ngoc Truong and Chi Paul Chen testified to the manner of voting in Viet Nam and the Hearing Officer and both parties agreed by stipulations (page 375 of Record of Proceedings) that "in Viet Nam the voters cross out the Candidate that they do not desire to vote for".

This is contrary to the "American way of voting".

Expert witness Phuong Ngoc Truong testified that if he was an employee, "and was voting for the first time in this country, and had he received a Ballot written in English, that he would be confused."

Phuong further testified that his wife, a graduate of an American University and who had lived in this country for 12 years, when voting for the first time in the Presidential Election "was not able to understand the method of voting, even though she had that kind of background."

Witnesses Chi Paul Chen and run Nhek further testified to the fact that if they were Vietnamese employees and received English Ballots, that they, too, would be confused.

Hearing Officer Small neglected completely the testimony of employees H Dinh Nguyen, Phu Huu Nguyen, and Moan Van Nguyen.

These three Vietnamese employees were also voting for their first time in this country.

All three employees testified that they received "English only Ballots" and in their prepared statements remarked that they were confused as to the manner of voting and "that after voting, I made a mistake on my part because I did not know the American way of voting and the Company lost." "Many of my Vietnamese friends did the same thing."

Hearing Officer Small neglected to consider the testimony of American witnesses James Bradford and Doug Crout who both testified that they received English-only Ballots from someone other than Agent Plon.

Obviously, Bradford and Crout had no problem in voting. As with any American, they knew what yes and no meant in English.

Bradford's recollection of almost word for word as to what appeared on the English-only Ballot and the fact that he received his Ballot from one of the Observers leads the Employer to credit the Employer's witnesses rather than Agent Plon's statement that he had possession of the Ballots.

The fact that a few of the employees failed to mention the English-only aspect of the Ballots in their statements attached to the Employer's Exceptions is of little consequence, as they were never asked. If Hearing Officer Small felt that more verification was required than that presented at the Hearing, he failed by not questioning the employees while they were on the witness stand.

Small again makes assumption that "three of the four incorrectly testified they received their Ballots from someone at the Observer's Table". He views this as "serious

failure of recollection to be sufficient to question the veracity of these witnesses on this issue, although not grounds to discredit them per se." The Employer questions what Small is really saying?

Hearing Officer Small finds it "very interesting" throughout his addressing Objection 9, the fact that employees can vote, make a mark on a Ballot, and then fold it, all in approximately five (5) seconds, or one-tenth of a minute.

Obviously, Hearing Officer Small has endeavored to place too much emphasis on the time it takes to mark a Ballot. Small, if feeling that this issue was important, could have asked for time-studies to be performed or demonstrations made by witnesses and have some person time the performance of these tasks. This he failed to do. He offers no proof that such a task could not be performed in such time.

The Employer's Representative is known Nationally as an expert in the field of Industrial Engineering and Time-Study and could very well have provided the facts that to accomplish the tasks of marking an "X" in a block and simultaneously fold the Ballot while walking out of the Voting Booth, takes less than five (5) seconds.

It is also recognized as fact in Industrial Engineering circles that most production employees have a tendency not to understand or estimate "time" accurately.

Small, on the other hand, credits two Union witnesses in all matters of their record testimony and failed to consider the dis-creditability of Union witness Terry Gaudlip whose discharge for cause was upheld in a Pennsylvania Labor Relations Board Hearing and was prosecuted and found guilty for acts of destruction of Government property on the Company premises during the Election campaign and would not permit the Employer's Representative to bring out Gaudlip's character and creditability as a witness at the Hearing.

Union Observer Getman's statment can hardly be called creditable: "I did not read each Ballot in full, but I could tell that they were all exactly the same and they were exactly. . . ." If Getman, as he testified, didn't read each Ballot, how else is there to know if they were in English or bi-lingual but to read the text that appeared on the Ballot?

Small further fails to discredit witness Gaudlip's testimony on other matters, yet when questioning, he personally found Gaudlip lying under oath, and the Hearing had to be recessed by him as the witness broke down under his examination. (See testimony beginning page 510 of Official Proceedings.)

Hearing Officer Small states "he finds no agreement was reached by the parties and Region 4 concerning the presence of a translator or interpreter during the Election." Therefore, he credits Valentinuzzi, Connolly, and Plon on this issue, his reason being that there is no "contradictory evidence".

Union Representative Connolly, in his testimony, corroborated the Employer's request for a neutral Vietnamese interpreter to be present at the Election during the Pre-Election Conference and for assistance in running the Election.

Connolly states "We had a lot of discussion about the Vietnamese: and in response to the question, specifically, the interpreter, Ballots and so forth, he states "The fact that there was a large group of Vietnamese involved in the coming Election and how we could communicate with them insofar as the Election could be conducted because the Board Agent was specifically wondering how that would be done and was looking for agreement from us."

Connolly further verified the fact that "Mr. Stambaugh indicated that they could get somebody from that Agency to . . ." "Let me tell you what I can recall of it. That the Board Agent said that he understood there were some . . .

after we had had the discussion, well he understood that there was one and if they had difficulty getting translations for the Rules and Regulations on Conduct of Election and the Ballot or anything that he was now aware of where he could go to settle that."

"But he didn't commit he was going to do it and provide someone."

Hearing Officer Small, further, rather pointedly and urgently, denied cross-examination of Connolly by Council for the Regional Director, Miss Joseph. Mr. Valentinuzzi, and a re-cross examination by Mr. Ferko, and then dismissed the witness. (See page 536 of the Record of Proceedings.)

The Board is requested to review the Official Transcript of the Joint Conference Proceedings which took place on May 6, 1981, at the U.S. Post Office Building, PEDC Conference Room, 813 Market Street, Harrisburg, Pennsylvania, at 10:00 o'clock in the forenoon.

What Small failed to do was consider the testimony of all parties on this matter and the testimony of Agent Plon who testified to this issue as follows: "I do recall your specific reference. I do recall that you raised the issue of having an interpreter present, a neutral interpreter in order to assist in running of the Election."

To the question asked by the Employer's Representative "Do you remember the issue that was raised that this would be left up to the Region, the Regional Director, to provide since he's responsible for conducting the Election?"

Agent Plon responded "Not exactly that way. What I recall is that after my phone conversation with the Region, I dictated to the parties how we would do it. It was not a situation where the parties agreed that. . .."

Agent Plon further testified that he made the decision for the Board over both parties objections that there would be no interpreter.

Plon further testified that "the way I was going to conduct the Election was to have a bi-lingual Ballot and a bi-lingual Notice."

Yet, the Employer received Employer Exhibit 1 (Election Notice) in English only the just shortly before the Election, received Employer Exhibit 2 (Bi-lingual Election Notice) which was posted several days before the Election as required by law.

This apparent mix-up came from the inabilities of Agent Plon to follow his own decision. This added confusion to the Vietnamese voters as was brought out during Hearings on the Employer's Objections.

Whether or not all Vietnamese employees thoroughly understood or even saw the Bi-lingual Notice is a timely manner [*which*] was not pursued.

When the Employer subpoenaed the "Actual Ballots" of the Election to see whether or not they were in English or Vietnamese, the Regional Director failed to provide the Actual Ballots.

Officer Small completely discarded this matter and the impact such evidence would have to support the Employer's Objection 9.

Agent Plon failed to bring out in testimony his responsibility for accounting for *all Ballots* that were to be used at the Election.

Agent Plon verified testimony by Observer Longenecker and Union Officials that questions arose just minutes away from the Election about the Pre-Election Conference held by all parties in the voting area. Officer Small disregarded this important testimony by Board Agent Plon.

Hearing Officer still further failed to consider the fact that testimony brought out by Union Observer Getman and put on record by Officer Small, that Plon could have brought both English and bi-lingual Ballots to be used at the Election.

Seven Employer witnesses testified that they received English-only Ballots. No proof beyond a reasonable doubt was produced by the Union or the Board that mixed Ballots were not in use in the Election.

The responsibility for "security of the Ballots", a responsibility of Agent Plon and the Regional Director, was given no weight whatsoever in this matter; thus throwing great discredit upon the Regional Director and Agent Plon in the "one-sided-ness of the Election" as so handled.

The Employer feels that the constitutional rights of the Vietnamese "Boat People", voting for the first time in this country, were violated, and, in the circumstances as outlined above, the Board did not satisfy the conditions to assure the effective and informed expression by all the Vietnamese employees of their true desire.

EMPLOYER'S EXCEPTIONS TO HEARING OFFICER'S REPORT ON OBJECTIONS

E) CLOSING STATEMENT

The Employer has endeavored to present factual evidence and proof to the Board that Employer Objections 2, 6, 7, and 9 are valid objections that merit the Employer's request for the Board to set aside the Election conducted on May 28, 1981.

The Employer respectfully requests that the Board:

1) Consider the objections and incidents presented cumulatively rather than as isolated incidents.

2) Consider, in addition to all objective evaluations normally employed, subjective evidence as well.

3) Determine not only whether the conduct complained of was coercive but also whether it was so related to the Election as to have a probable effect on the employee's actions at the polls or created an environment of tension so as to preclude employees from experiencing free choice.

The Employer prays the Board sustains its objections and exceptions as filed and order the Regional Director to set aside the original Election and to conduct a new election.

Respectfully submitted,

STAMBAUGH'S AIR SERVICE, INC.

Joseph G. Ferko, Jr., Esquire
Authorized Representative

APPENDIX N

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 4-RC-14673

STAMBAUGH'S AIR SERVICE, INC.

Employer

and

LOCAL LODGE 1776, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO

Petitioner

DECISION AND CERTIFICATION OF REPRESENTATIVE

Pursuant to authority granted it under section 3(b) of the National Labor Relations Act, as amended, a three-member panel has considered objections to an election held May 28, 1981,[1] and the Hearing Officer's Report recommending disposition of same. The Board has reviewed the record in light of the exceptions and brief, and hereby adopts the Hearing Officer's findings[2] and recommendations.

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[1] The election was conducted pursuant to a Stipulation for Certification Upon Consent Election. The tally was: 61 for, and 60 against, the Petitioner; there were no challenged ballots.

[2] The Employer has excepted to certain credibility resolutions made by the Hearing Officer. It is the established policy of the Board not to reverse a hearing officer's credibility resolutions when they are based on observation of the demeanor of witnesses as they testify at the hearing, unless the clear preponderance of all the relevant evidence convinces us that the resolutions were incorrect. *The Coca-Cola Bottling Company of Memphis*, 132 NLRB 481, 483 (1961); *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We have carefully examined the record in this case and see no basis to reverse the Hearing Officer's credibility resolutions.

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that a majority of the valid ballots have been cast for Local Lodge 1776, International Association of Machinists and Aerospace Workers, AFL-CIO, and that, pursuant to Section 9(a) of the Act the foregoing labor organization is the exclusive representative of all the employees in the following appropriate unit for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment:

> Included: All full-time employees classified as laborers, janitors, leadmen, quality control inspectors, material control, flight line, engine shop, hydraulic shop, electric shop, egress shop, general plant, sheet metal, ground power and maintenance employees.

* * *

APPENDIX O

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTH REGION

Case 4-CA-13373

STAMBAUGH'S AIR SERVICE, INC.

and

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS, AFL-CIO

COMPLAINT AND NOTICE OF HEARING

If having been charged by International Association of Machinists and Aerospace Workers, AFL-CIO, herein called the Union, that Stambaugh's Air Service, Inc., herein called Respondent, has engaged in, and is engaging in, certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C. Section 151, *et seq.*, herein called the Act, the General Counsel of the National Labor Relations Board, herein called the Board, on behalf of the Board, by the undersigned Acting Regional Director for the fourth Region, hereby issues this Complaint and Notice of Hearing pursuant to Section 10(b) of the Act and Section 102.15 of the Board's Rules and Regulations, Series 8, as amended, and alleges as follows:

1. The charge was filed on December 2, 1982, and a copy thereof was served on Respondent by certified mail on December 2, 1982.

2. (a) Respondent is, and has been at all times material herein, a Pennsylvania corporation engaged in the performance of maintenance service on aircraft at its facility

located at Harrisburg International Airport, Middletown, Pennsylvania.

(b) During the past year, Respondent, in the course and conduct of its business operations described above in subparagraph (a), purchased and received at its Middletown, Pennsylvania facility products, goods and materials valued in excess of $50,000 directly from points outside the Commonwealth of Pennsylvania.

(c) Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

3. (a) The Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

(b) Local Lodge 1776, International Association of Machinists and Aerospace Workers, AFL-CIO, herein called Local Lodge 1776, is, and has been at all times material herein, a labor organiztion withint the meaning of Section 2(5) of the Act.

4. Mark R. Stambaugh is, and has been at all times material herein, President of Respondent, and is, and has been at all times material herein, a supervisor of Respondent within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section 2(13) of the Act.

5. The following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> Included: All full-time employees classified as laborers, janitors, leadmen, quality control inspectors, material control, flight line, engine shop, hydraulic shop, electric shop, egress shop, general plant, sheet metal, ground power and maintenance employees.
>
> Excluded: All office clericals, part-time employees, pilots, co-pilots, watchmen, guards and supervisors as defined in the Act.

6. On September 8, 1982, Local Lodge 1776 was certified as the exclusive bargaining representative of the employees in the unit described above in paragraph 5.

7. At all times since September 8, 1982, Local Lodge 1776, by virtue of Section 9(a) of the Act, has been, and is, the exclusive representative of the employees described above in paragraph 5, for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

8. On or about October 19, 1982, the Union, by letter from Grand Lodge Representative Tim Connolly, requested Respondent to recognize Local Lodge 1776 and to bargain collectively with Local Lodge 1776 as the exclusive collective bargaining representative of the employees described in paragraph 5, above, with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

9. Since on or about October 28, 1982 Respondent has failed and refused to recognize Local Lodge 1776 and to bargain with Local Lodge 1776 as the exclusive collective bargaining representative of the employees in the unit described above in paragraph 5.

10. By the acts and conduct described above in paragraph 9, and by each of said acts, Respondent has failed and refused, and is failing and refusing, to bargain collectively with the representative of its employees, and Respondent thereby has been engaging in unfair labor pracitces within the meaning of Section 8(a)(1) and (5) of the Act.

11. The unfair labor practices of Respondnet described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

PLEASE TAKE NOTICE that on the 26th day of May, 1983, at 10:00 o'clock in the forenoon, Eastern Daylight Savings Time, at a place to be designated later, a hearing will be conducted before a duly designated Administrative

Law Judge of the Board on the allegations set forth in the above Complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony. Summary of Standard Procedures in Formal Hearings Held Before the National Labor Relations Board in Unfair Labor Practice Proceedings, pursuant to Section 10 of the National Labor Relations Act, as amended, is attached.

You are further notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, Respondent shall file with the undersigned Acting Regional Director, acting in this matter as agent of the Board, an original and four copies of an answer to said Complaint within ten days from the service thereof and that, unless it does so, all of the allegations in the Complaint shall be deemed to be admitted to be true and may be so found by the Board. Immediately upon the filing of the answer, Respondent shall serve a copy thereof on each of the other parties.

Dated at Philadelphia, Pennsylvania this 13th day of January, 1983.

FRANCIS W. HOEBER,
Acting Regional Director
for the Fourth Region
National Labor Relations Board

Excluded: All office clericals, part-time employees, pilots, co-pilots, watchmen, guards and supervisors as defined in the Act.

Dated, Washington, D.C., September 8, 1982.

JOHN H. FANNING, Member

HOWARD JENKINS, JR., Member

DON A. ZIMMERMAN, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX P

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTH REGION

Case 4-CA-13373

STAMBAUGH'S AIR SERVICE, INC.

and

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS, AFL-CIO

MEMORANDUM IN OPPOSITION TO COUNSEL FOR GENERAL COUNSEL'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF EMPLOYER'S MOTION TO DISMISS

A. BACKGROUND

The unfair labor practices alleged and at issue in this proceeding are predicated upon the Board's Decision and Certification of Representative issued in 4-RC-14673 and based upon the Hearing Officer's Report on Objections which arose in the context of a Board-directed hearing on objections. Thus, these 8(a)(1) and (5) charges, at issue in this unfair labor practices proceeding, arise from the employer's refusal to bargain pursuant to the Board's Decision and Certification of Representative in 4-RC-14673. Often such "test certification" refusal to bargain are appropriate candidates from summary judgment disposition. However, this case does not fall within that category.

It is respectfully submitted that the Board's adoption, without discussion or analysis, of the Hearing Officer's Report on Objections incorporated and adopted two dispositive defects of the Hearing Officer's Report on Objections.

This contention involves the Hearing Officer's treatment and disposition of Objection 9, which was one of the employer's objections properly before the Hearing Officer and fully adjudicated in the context of the hearing process. The objection involved the Board's treatment of foreign language (Vietnamese) voters. Throughout the objections process,[1] the stated basis and the clear thrust of the employer's Objection 9 was directed to the Board's treatment of foreign language voters and involved two (2) considerations:

> (a) That the Board ignored the employer's request first made at the time of the execution of the stipulation for certification (hereinafter "Stip. Cert.") for a translator/interpreter in the context of the actual election/voting procedure.
>
> (b) Secondly, that the Region failed to supply bilingual ballots in the context of an unit of employees which had a substantial number (approximately 30%) of Vietnamese natives who neither read or spoke enough English to participate in a routine election.

The Hearing Officer's Report on Objections fails, *in toto*, to deal with the first aspect of the employer's objections. Thus, the Hearing Officer's Report (pages 10 through 15) fails to deal with the aspect of Objection 9 which raised the Region's failure to supply a translator as objectionable. The Hearing Officer's Report which was adopted, without comment by the Board, does not dispose of this significant aspect of the objections pertaining to the conduct of the election in 4-RC-14673. As noted by the Hearing Officer, approximately forty (40) of the one hundred thirty (130) employees eligible to vote were Vietnamese who had recently come to this country.

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[1] Should be noted that counsel was not involved in prior proceedings before the Board and that the conduct of the objections investigation and hearing was conducted by a "Labor Consultant" and who is not a member of the Bar.

The record discloses that the employer clearly notified the Region, at the time of the execution of the Stip. Cert. and again at the pre-election conference, of the need for a translator to insure the integrity of voting procedures. The Hearing Officer's Report, however, mischaracterizes the foreign language issue in the following way: ". . . I have determined that Objection 9 involves primarily the employer's claim that some or all of the official ballots were english only creating confusion among Vietnamese voters." (Hearing Officer's Report in 4-RC-41673 at page 9). Thus, the Hearing Officer's discussion and disposition of the Objection 9 fails to differentiate between the procedural and substantive issues pertaining to the treatment of foreign language voters which are present in this record.

Assuming, arguendo, that the Hearing Officer was correct in his finding that a bilingual ballot was used and distributed during the election, neither the report not the ensuing Board Order deal with the procedural aspect of the employer's Objection 9 concerning voting procedures. Thus, it is uncontested that the voting procedures which prevail in Vietnam, when applied to the balloting procedures utilized by the NLRB (whether the ballot is "Bilingual" or "English only"), reflect an inversion of the ballot-marking process that fatally contaminates the results of this election.

It is uncontroverted that any Vietnamese employee would signify their preference by following the Vietnamese methodology to mark the ballot. To signify a "yes" vote, a Vietnamese voter would mark the "no" box, and a "no representation" vote would be cast by marking in the "yes" box. Thus, Vietnamese mode of indicating preference is to "cross out" rather than indicate their preference by marking in the box. Thus, whether or not the ballot was "bilingual" or "English only," the methodology for marking ballots, which was familiar to one-third (1/3) of the voters, was diametrically opposite to the manner in which the Board interprets markings on the ballot. Nowhere in the

Report on Objections or the ensuing Board Order is this fundamental procedural problem addressed. An additional component of this problem, established at the Hearing on Objections, is the fact that referendum voting (i.e., a yes-no vote) was alien to Vietnamese experience.

In spite of the fact that the "R" case record clearly reflects the employer's insistance upon a translator for the election; the Board, on its own, undertook to proceed without the benefit of a translator and thereby created a fatal confusion in the voting process. The voting methodology issue implicates up to forty (40) ballots and the election was decided by a single vote. Thus, the ensuing Certification of Representative is not adequately suported by law or a valid election process.

The second aspect of the employer's Objection 9 pertaining to the treatment of foreign-language voters involves the question dealt with at some length by the Hearing Officer's Report. Throughout the Hearing on Objections, the issue of the use of "bilingual" versus the "All-American" (English only) ballots arose. The Hearing Officer purported to determine the "bilingual" versus "English only" issue on a basis of credibility. In doing so, he ignored the fact that the Regional Office failed to comply with two (2) established aspects of Board's policies pertaining to Representation proceedings. This failure resulted in an election prejudicial to the interests of the unit employees and employer.

The National Labor Relations Board Case Handling Manual, Part 2, which covers Representation Proceedings, provides, at Section 11342, as follows:

> ". . . Marked ballots: in bundles of 50 . . . should be preserved until the case is *finally closed;* unmarked ballots should be carried away from the premises or immediately destroyed. . . ." (Emphasis added)

Although the employer attempted to subpoena the "marked" ballots subject to that policy and involved in 4-RC-14673, and although procedure clearly required that those ballots

be preserved during the pendency of objections, the Region was unable to supply said ballots which had been destroyed by the Regional Office. The only ballots available at hearing purported to be excess sample ballots, which according to the terms and provisions of the Representation Proceedings Manual, *should have been* destroyed. The Regional Office, as a result of its failure to follow established Board policy, was confronted with an insoluble credibility problem.

The voters most familiar with the Vietnamese language universally testified that the ballots given them at the time of the election did not contain a Vietnamese translation of the election question. The only witnesses who testified positively concerning existence of "bilingual" ballots were not qualified in the record as conversent with the Vietnamese language. Thus, at most, the Board Agent and union representatives who testified that the ballots were "bilingual" did so without actual knowledge of or proficiency in Vietnamese. The employer's witnesses, native Vietnamese and eligible employees, testified under extensive cross-examination that the ballots which were used in the election were "English only."[1] Whether or not the Vietnamese employees were accurate in their recollection, it should be noted that their universal confusion would have been obviated had a translator been present throughout the election. In the context of this substantive issue, it must be noted that none of the witnesses who affirmed the existence of a bilingual ballot were competent to recognize Vietnamese or to read and interpret any non-English markings which appeared on the ballot. The improper destruction of the marked ballots created a virtually insoluble "best evidence" issue, which the Hearing Officer resolved based upon the testimony of witnesses who did not speak, write, or recognize Vietnamese.

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[1] It is an unrebutted possibility that the actual ballots included characters which appeared to be Vietnamese but which in fact were not.

Furthermore, the Board's Case Handling Manual, Part 2, provides, a Section 11314, that:

> ". . . Foreign language: Notices printed in foreign languages may also be posted. If a foreign language notice is used, that language must also be used on the ballot. . . ."

Thus, the custody of the "marked" ballots becomes doubly relevant in a case such as this where the Hearing Officer found that bilingual notices were posted and the uncontroverted evidence of the Vietnamese-speaking employees was to the effect that the ballot was in "English only." Obviously, the presence of a translator could have also obviated or ameliorated any "English only" problem and could have obviated any procedural confusion or any anxiety and apprehension of a first-time voter who is unfamiliar with the English language. In a case where the election has been decided by a single vote and where the Region failed to follow Board policies and procedures with regard to the custody and continued existence of marked ballots which would be the best evidence pertaining to Objection issue No. 9, it is submitted that the credibility determination of the Hearing Officer is fatally defective. Those findings appeared to be predicated upon linguistic fluency and to penalize the Vietnamese voter-witnesses who were not only unfamiliar with the NLRB election procedures but who were also unfamiliar with administrative law process and who were understandably nervous in the context of a formal administrative proceedings. The credibility determinations of the Hearing Officer take on a "racial/ethnic" overtone, albeit an inadvertent one, when the Hearing Officer in his report failed meaningfully to deal with the record recitations reflecting the confusion and apprehension that was articulated by the Vietnamese-speaking employees-witnesses. The arbitrary and unfounded credibility determinations of the Hearing Officer were adopted without comment by the Board.

Assuming, arguendo, that the parties did not agree concerning the need for a translator, the record here discloses the correctness of the employer's position that "laboratory conditions" could only have been preserved by the use of a translator during the election process. On the foregoing basis, it is submitted that this case is conceptually identical to the facts in *NLRB v. Triplex Manufacturing Company*, (CA-7, 1983), 112 LRM 3042, 31 FEP 319. The Board effectively failed to hold a meaningful hearing and to make a meaning ful disposition pertaining to the allegations of objectionable conduct arising from the absence of a translator and the "bilingual/English" ballot dispute. The Board's adoption, without comment, of the defective Hearing Officer's Order resulted in this 8(a)(1) and (5) charge and the present Motion for Summary Judgment. It is submitted that the requested summary judgment for the Counsel for the General Counsel is not only inappropriate but also that the Board should reconsider the validity of the Certification of Representative previously issued in 4-RC-14673.

Wisdom, because it comes late, should not be ignored.

B. LEGAL ARGUMENT

The Board's adoption of the Hearing Officer's Report reflected in its Decision and Certification of Representative in 4-RC-14673 is not supported by substantial evidence in the record as a whole. In fact, the Hearing Officer's Report, adopted without commeny by the Board, makes no disposition concerning the "translator" issue. Under established Board precident, this determination is fatally defective and cannot serve as a b[illegible] for any finding that the employer has improperly refuse[illegible] to bargain with the IAM/AW. See and compare *Decible Products*, 108 LRRM 2598 (CA-5, 1981); *NLRB V. Belcon, Inc., d/b/a San Jose Care and Guidance Center*, 108 LRRM 2244 (CA-9, 1981); *McClendon Trucking*, 107 LRRM 1081, 225 NLRB No. 168; *NLRB v.*

Allis-Chalmers Corp., 110 LRRM 2817 (CA-7, 1982); and *NLRB v. Advance Systems, Inc.*, 109 LRRM 3089 (CA-9, 1982). As was the case in *Allis-Chalmers, supra*, the Board abused its discretion the context of the "R" case process when it adopted an Order without examining all the evidence and issues in the case or the incomplete findings of the Hearing Officers pertaining to employer's Objection 9. Similarly, the Board and the Hearing Officer totally failed to discuss the Region's noncompliance with the established "R" case procedures and the complexities which ensued from the destruction of the marked ballots.

The record made before the Hearing Officer reflects the widespread voter confusion concerning the voting process and procedures on the part of the forty (40) Vietnamese voters. Notice of the problem was promptly communicated to the Regional Office, and the Region's decision not to utilize a translator resulted in contamination of the crucial laboratory conditions surrounding the election process. The resulting one-vote plurality, in the context of one hundred twenty-one (121) cast votes, led to the Board's certification of the IAM/AW.

It is respectfully submitted that this case differs substantially from decisions such as *Sanitas Service Corp.*, 110 LRRM 1558, 262 NLRB No. 173, which involved, *inter alia*, an isolated problem of voter illiteracy in the context of the election process; or the issues which confronted the Board in *Magic Pan, Inc. v. NLRB*, 105 LRRM 2559 (CA-7, 1980). Unlike *Magic Pan, supra*, where the employer failed to apprise the Region of language problems, this is a case where the Region ignored the repeated advice of the employer concerning the need for a translator as a means of insuring that one-third (1/3) of its "unit" employees could participate in the election under appropriate laboratory conditions, which the Board always seeks to maintain in the election process. Instead of preserving the laboratory conditions which the Hearing Officer characterized as

in . . . a sacred trust of the Board, the lightest hint of taint to the objectivity of the election process warrants review. . . ." (Hearing Officer's Report, Page 9, *Stambaugh's Air Service, Inc.*, 4-RC-14673.); the Region's inaction effectively excluded forty (40) employees from the election process.

Furthermore, the Hearing Officer failed to deal with the Region's noncompliance with Board procedures as well as the resulting confusion and "Cartesian" doubt engendered by the Region's destruction of the "marked" ballots. As previously noted, the existence, *vel non*, of a "bilingual" ballot in no way disposes of the procedural problems the *election processes* presented for the forty (40) Vietnamese voters who attempted to participate in the election process.

Either deficiency (the ballot language or voting process deficiency), standing alone, would be sufficient to undermine the validity of the election results; the Hearing Officer's Report; and the ensuing Board Order adopting that report without comment.

There is an unrebutted suggestion in the "R" case record, that as many of the ballots cast in this election were mismarked because of voter unfamiliarity with NLRB voting procedures and the manner in which the Board interprets ballot markings; a manner diametrically opposed to the marking procedures employed in Vietnam. This unresolved problem undermines the validity of the one-vote union majority, especially in the context of Regional noncompliance with Board procedures, the omissions in the Hearing Officer's Report and the omissions in the ensuing Decision and Certification of Representative upon which these unfair labor practice charges are predicated.

While it is possible that the Region could seek, in the context of these unfair labor practice proceedings, to remedy the evidentiary and procedural deficiencies embodied in the Hearing Officer's Report and the Board's Order,

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it is, *a fortiori*, a situation where summary judgment is not appropriate. Thus, whether or not the Region might seek to adduce evidence from each Vietnamese employees concerning the employee's understanding of the election process, such evidence is not before the Board in the context of the General Counsel's Motion for Summary Judgment.

The Courts have longed recognized that the Board, through its agents, can engage in conduct which effectively destroys the validity of the election process. Thus, in *NLRB v. Decible Products, Inc., supra*, the Fifth Circuit found that Board Agent conduct destroyed the secrecy of the ballot and created a basis upon which an election and resulting certification were rendered null and void. See also *NLRB v. Belcor, Inc.*, 108 LRRM 2245 (CA-9, 1981). Thus, where as here, the Board orders a hearing on alleged objectionable conduct pertaining to foreign language voters and the ensuing Hearing Officer's Report *and* Board Order *fails* to fully dispose of and/or consider all of the allegations pertaining to foreign language voters which were before the Hearing Officer and the Board; the Board has issued a *void* Certification of Representative. In this context, it should be noted that Objection 9 was reurged in exceptions to the Hearing Officer's Report on a prompt and timely filed basis before the Board, and the Board did not comment upon it. (See Employer's Exceptions to Hearing Officer's Report Upon Objections, pages 19-31.)

The Board has frequently acknowledged the policy importance of maintaining "laboratory conditions" during elections and obtaining representative/accurate voter participation. See *c.f. McClendon Trucking*, supra.

The Region's election arrangements adversely but inadvertently affected forty (40) of the eligible voters. The absence of a translator and the ballot content adversely affected a large number of eligible employees (a far larger absolute number than the number affected in *McClendon Trucking, supra*). The Certification is predicated upon a

one-vote victory (i.e., sixty-one (61) ostensible votes for representation versus sixty (60) votes for no representation). It is apparent that the Region and the Board should have promptly set this election aside and ordered a rerun election. However, the passage of time has made such a course of action inappropriate. It would, on these facts, be more appropriate to simply set aside the void Certification of Representative and leave the parties to their ordinary Board procedures.

The conspicuous failure of the Hearing Officer's Report and of the ensuing Board Order to consider noncompliance with Board procedures standing alone is sufficient to contaminate the election and ensuing Certification of Representative. The failure to properly retain the marked ballots and to insure that the Region was able to document compliance with its foreign language notice/ballot requirements are both failures to adhere to established Board policy. See and compare *NLRB v. Granite State Minerals, Inc.*, 109 LRRM 3335 (CA-1, 1982). The Board, itself, has acknowledged that when dealing with a foreign-language-speaking voter, avoidance of confusion and linguistic difficulties is an important policy concern. See and compare *Rattan Art Gallery*, 109 LRRM 1149, 260 NLRB 18 (1982).

C. SUMMARY

The Hearing Officer's Report failed to fully consider all of the objections upon which the Board directed hearing. The Board adopted the erroneous and incomplete report of the Hearing Officer and issued a void Certification of Representative. On the foregoing basis, the ensuing 8(a)(1) and (5) charges are obviously not a candidate for disposition by summary judgment. At most, Counsel for the General Counsel could attempt, by calling all forty (40) Vietnamese employees who were eligible voters to attempt to ascertain whether or not the voters were *in fact* confused by the election procedures following in this case.

While there is no mandate for such an approach in Board law, obviously such an attempt is conceptually possible. Such evidence, however, is not a matter of record at the present time and would not support a summary judgment disposition on the 8(a)(1) and (5) charges before the Board in this matter.

Respectfully submitted,

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Attorney for Stambaugh's Air Service, Inc.

Dated:

APPENDIX Q

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 4-CA-13373

STAMBAUGH'S AIR SERVICE, INC.

and

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS, AFL-CIO

DECISION AND ORDER

Upon a charge filed on 2 December 1982 by International Association of Machinists and Aerospace Workers, AFL-CIO, herein called the Union, and duly served on Stambaugh's Air Service, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 4, issued a complaint on 13 July 1983 against Respondent, alleging that Respondent had engaged in an was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on 8 September 1982, following a Board election in Case 4-RC-14673, the Union[1] was duly

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[1] Local Lodge 1776 of the Union was selected as the exclusive collective-bargaining representative.

certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[2] and that, commencing on or about 28 October 1982, and at all times thereafter, Respondent has refused, and continues to date to refuse, the bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On 7 March 1983 Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On 7 March 1983 counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on 10 March 1983 the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a motion to dismiss and a memorandum in opposition to counsel for the General Counsel's Motion for Summary Judgment and in support of the Employer's motion to dismiss.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

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[2] Official notice is taken of the record in the representation proceeding, Case 4-RC-14673, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F. Supp. 573 (D.C. Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

Ruling on the Motion for Summary Judgment

In its answer to the complaint, its opposition to the Motion for Summary Judgment, and its motion to dismiss, Respondent admits the Union's request for bargaining and its refusal to bargain, but attacks the Union's certification in the underlying representation proceeding. Respondent contends, in essence, that the Certification of Representative is void because the Hearing Officer and the Board failed to fully dispose of objections regarding the Region's allegedly improper election procedures for the foreign language voters. Counsel for the General Counsel contends that all matters raised by Respondent were litigated in the underlying representation hearing. We agree.

Review of the record herein, including the record in Case 4-RC-14673, reveals that Respondent's objections to the election included, *inter alia*, the allegation that the Region violated established election procedures regarding foreign language voters by failing to provide bilingual ballots or a translator for Vietnamese voters. On 9 April 1982 Hearing Officer James F. Small issued a Report on Objections recommending that all the objections be overruled. The report incudes a specific discussion and rejection of Respondent's objection based on the absence of a translator and the failure to provide bilingual ballots. The Board adopted the Hearing Officer's finding and recommendation to overrule the objections in their entirety on 8 September 1982 in its Decision and Certification of Representative. It thus appears that Respondent is attempting in this proceeding to relitigate issues fully litigated and determined in the representation proceeding.[3]

It is well settled that in the absence of newly discovered or previously unavilable evidence or special circumstances a respondent in a proceeding alleging a violation of Section

[3] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

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8(a)(5) is not entitled to relitigate issue which were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavilable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgement.[4]

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. The Business of Respondent

Respondent is a Pennsylvania corporation engaged in the performance of maintenance and service on aircraft at its Harrisburg International Airport facility in Middletown, Pennsylvania. During the 12-month period preceding the issuance of the complaint, a representative period, Respondent, in the course and conduct of its operations, purchased and received at the above-mentioned facility products, goods, and materials valued in excess of $50,000 directly from points outside the Commonwealth of Pennsylvania.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

International Association of Machinists and Aerospace Workers, AFL-CIO, and Local Lodge 1776, International

[4] For the same reasons, we deny Respondent's motion to dismiss and its alternative request for hearing.

Association of Machinists and Aerospace Workers, AFL-CIO, are labor organizations within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. The Representation Proceeding

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> Included: All full-time employees classified as laborers, janitors, leadmen, quality control inspectors, material control, flight line, engine shop, hydraulic shop, electric shop, egress shop, general plant, sheet metal, ground power and maintenance employees.
>
> Excluded: All office clericals, part-time employees, pilots, co-pilots, watchmen, guards and supervisors as defined in the Act.

2. The certification

On 28 May 1981 a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 4, designated Local Lodge 1776 of the Union as their representative for the purpose of collective bargaining with Respondent.

Local Lodge 1776 of the Union was certified as the collective-bargaining representative of the employees in said unit on 8 September 1982, and it continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. The Request To Bargain and Respondent's Refusal

Commencing on or about 19 October 1982, and at all times thereafter, the Union has requested Respondent to bargain collectively with Local Lodge 1776 of the Union as the exclusive collective-bargaining representative of all the

employees in the above-described unit. Commencing on or about 28 October 1982, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with Local Lodge 1776 of the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since 28 October 1982, and at all times thereafter, refused to bargain collectively with Local Lodge 1776 of the Union as the exclusive representative of the employees in the appropriate unit and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.[5]

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with Local Lodge 1776 of the Union as the

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[5] Chairman Dotson did not participate in the original Board decision wherein the Board adopted the Hearing Officer's finding and recommendation to overrule the objections of the Em.ployer. Even though had he been on the panel his decision would have been different from the Board, Chairman Dotson feels compelled to approve the granting of the summary judgment at this stage of the proceedings.

exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

In order to ensure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Consturction Company*, 149 NLRB 1419, 1421 (1964), enfd. 250 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Stambaugh's Air Service, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Association of Machinsts and Aerospace Workers, AFL-CIO, and Local Lodge 1776, International Association of Machinists and Aerospace Workers, AFL-CIO, are labor organizations within the meaning of Section 2(5) of the Act.

3. All full-time employees classified as laborers, janitors, leadmen, quality control inspectors, material control, flight line, engine shop, hydraulic shop, electric shop, egress shop, general plant, sheet metal, ground power and maintenance employees at its Harrisburg International Airport facility; exclusing all office clericals, part-time employees, pilots, co-pilots, watchmen, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since 8 September 1982 Local Lodge 1776, International Association of Machinists and Aerospace Workers, AFL-CIO, has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about 28 October 1982, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Stambaugh's Air Service, Inc., Middletown, Pennsylvania, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Local Lodge 1776, International Association of Machinists and Aerospace Workers, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

Included: All full-time employees classified as laborers, janitors, leadmen, quality control inspectors, material control, flight line, engine shop, hydraulic shop, electric shop, egress shop, general plant, sheet metal, ground power and maintenance employees.

Excluded: All office clericals, part-time employees, pilots, co-pilots, watchmen, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Harrisburg International Airport facility in Middletown, Pennsylvania, copies of the attached notice marked "Appendix."[6] Copies of said notice, on forms provided by the Regional Director for Region 4, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

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[6] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(c) Notify the Regional Director for Region 4, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C. 7 July 1983

DONALD L. DOTSON, Chairman

HOWARD JENKINS, JR., Member

DON A. ZIMMERMAN, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX R

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Local Lodge 1776, International Association of Machinists and Aerospace Workers, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> Included: All full-time employees classified as laborers, janitors, leadmen, quality control inspectors, material control, flight line, engine shop, hydraulic shop, electric shop, egress shop, general plant, sheet metal, ground power and maintenance employees.